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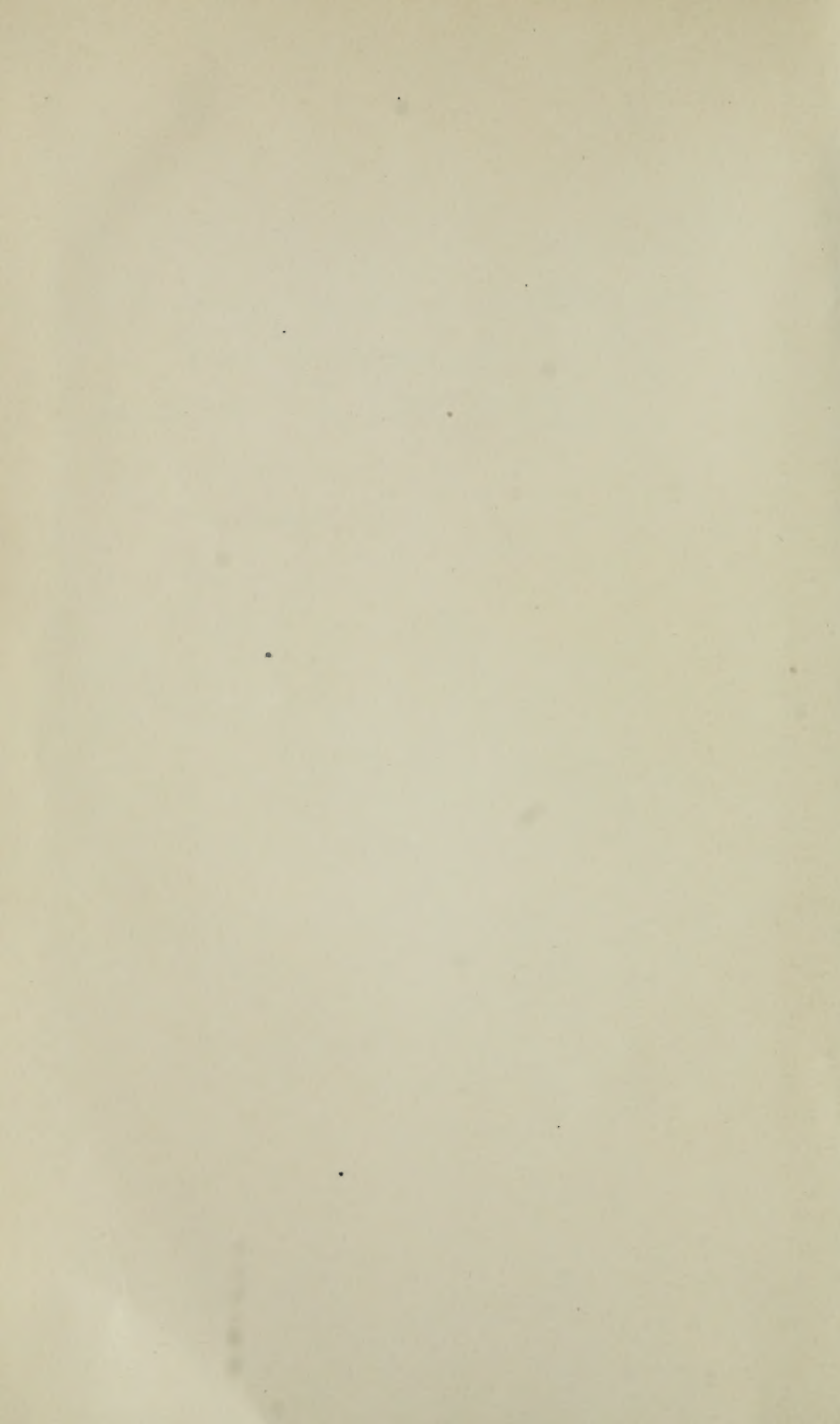
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874
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No. 2399

**In the United States Circuit
Court of Appeals**

For the Ninth Circuit

WESTERN UNION TELEGRAPH CO.

and SOUTHERN PACIFIC CO.,

Appellants

vs.

POSTAL TELEGRAPH CO.,

Appellee

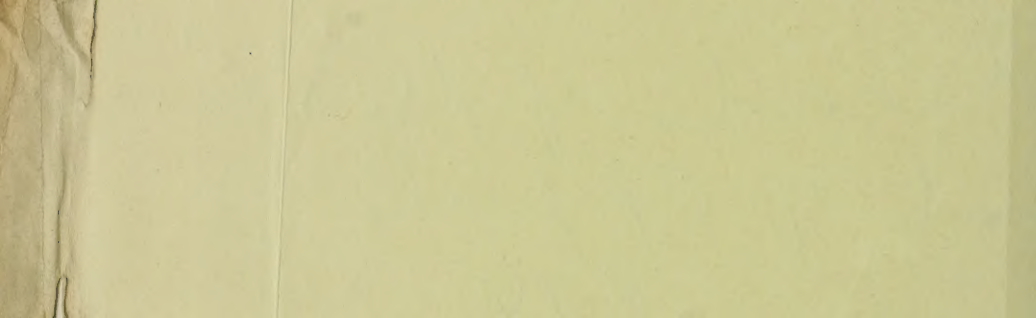
**Appeal from the District Court of the United States
For the District of Oregon.**

Transcript of Record

FILED

APR 3 - 1914

Records of U. S. Circuit
Court of Appeals
874



No.

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**WESTERN UNION TELEGRAPH CO.
and SOUTHERN PACIFIC CO.,
Appellants**

vs.

**POSTAL TELEGRAPH CO.,
Appellee**

**Appeal from the District Court of the United States
For the District of Oregon.**

Transcript of Record

Names and Addresses of Solicitors upon this Appeal

For Appellant, SOUTHERN PACIFIC CO.:

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JOS. E. FENTON,

BEN C. DAY and

KENNETH L. FENTON,

Portland, Oregon.

For Appellant, WESTERN UNION CO.:

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For Appellee:

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Chamber of Commerce Bldg., Portland, Ore.

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IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

Be it Remembered, That on the 25th day of August, 1911, there was duly filed in the Circuit Court of the United States for the District of Oregon, a Bill of Complaint in words and figures as follows, to-wit:

(BILL OF COMPLAINT.)

Postal Telegraph Company,

a Corporation,

Complainant,

vs.

Southern Pacific Company,

a Corporation,

Defendant.

TO THE HONORABLE THE JUDGES OF
THE CIRCUIT COURT OF THE UNITED
STATES WITHIN AND FOR THE DISTRICT
OF OREGON SITTING IN EQUITY.

Your orator, Postal Telegraph Company, a corporation duly organized under and pursuant to the laws of the State of Oregon and a citizen of the State of Ore-

gon, brings this bill against the Southern Pacific Company, a corporation, organized and doing business under and pursuant to the laws of the State of Kentucky and a citizen of said State of Kentucky.

Humbly complaining, your orator charges that a certain corporation known and called the Oregon and California Railroad Company, is the owner for railroad purposes of a certain strip of land or right of way, at no point less than sixty feet in width, and at some points one hundred feet and more in width, extending from Eugene in the County of Lane in the State of Oregon to the station of New Era in the County of Clackamas in said State of Oregon, the total distance being one hundred and three miles, upon part of which said right of way your orator maintains a telegraph line, the same being a portion of a telegraph line extending through the States of California, Oregon, Washington and other states of the Union.

And that the defendant, Southern Pacific Company, a corporation, owns a leasehold interest in the said right of way, having leased the same from the said Oregon & California Railroad Company, subject to the conditions and limitations imposed by law, and that the said defendant, Southern Pacific Company, owns and operates a railroad over and along the center of said right of way.

Your orator further charges that it is provided by Section 3964 of the Revised Statutes of the United States, that all railroads are post roads of the United States, and that the United States Government by the

terms and provisions of an Act commonly called the "Post Roads Act of Congress," the same being an Act entitled "An Act to Aid in the Construction of telegraph lines and to secure to the Government the use of the same for Postal, Military and other Purposes," Approved July 24, 1866, did authorize the use of the Post Roads of the United States by telegraph companies accepting the provisions of said Act.

Your orator further charges that more than twenty-four years ago, the Pacific Postal Telegraph-Cable Company, a corporation, organized and existing pursuant to the laws of the State of New York, which last named corporation had duly accepted the provisions of the said "Post Roads Act," and which corporation is the predecessor in interest of your orator, constructed a telegraph line along and upon said right of way of said defendant, erecting poles and attaching thereto cross-arms and stringing wires on said cross-arms for the speedy transmission of telegraph messages for the government and for private individuals; and your orator further says that the greater number of the poles of the said telegraph line between the town of Eugene aforesaid, and said station of New Era, now owned by your orator and so erected as aforesaid by the predecessor in interest of your orator, are not on the right of way of the said defendant, many of said poles being planted on land adjoining said right of way, and that in some places between the town of Eugene and the station of New Era aforesaid where your orator's telegraph poles are not on

the right of way of said defendant, but are planted on land adjoining the right of way, the cross-arms and wires attached to your orator's telegraph poles, overhang the right of way of the said defendant.

Your orator further charges that its predecessor in interest, the said Pacific Postal Telegraph-Cable Company, erected the said poles and attached thereto the said overhanging cross-arms and stretched thereon the said telegraph wires upon said railroad right of way without any permission from the said Southern Pacific Company, or its predecessor in interest said Oregon and California Railroad Company, or either of them, and without any license from the said defendant, or its said predecessor in interest and that ever since the erection of the poles and cross-arms and the stringing of the wires of said telegraph line more than twenty-four years ago, the possession of your orator and of its predecessor in interest, has been open, notorious, peaceable, adverse, continuous, and uninterrupted, and with the full knowledge and acquiescence of said defendant Southern Pacific Company and its said predecessor in interest, and that your orator has the right in law and in equity to maintain, use, repair, reconstruct, improve and enjoy its said telegraph line so as aforesaid erected, and to add from time to time as business increases, such additional wires as are necessary to accommodate the Government of the United States and the Public.

Your orator further charges that in the year 1888, as your orator is informed and believes, and therefore

alleges and many years after the construction of your orator's said telegraph line as aforesaid upon the said right of way of the said Oregon and California Railroad Company, the said Oregon and California Railroad Company demised and let its said roadbed and right of way to the said Southern Pacific Company, to have and to hold for and during the term of 99 years, beginning in to-wit: 1888, and ending, to-wit: in the year 1987, and thereupon the said Southern Pacific Company entered into and upon the said right of way and its leasehold estate therein so granted to it as aforesaid; and your orator says that at the time the said Southern Pacific Company so entered upon the said right of way and took possession of the leasehold estate therein so acquired from said Oregon and California Railroad Company, the telegraph line of your orator was built thereon and for a long time prior thereto had been built and maintained thereon as aforesaid, and the said Southern Pacific Company entered upon the said roadbed and right of way of said Oregon and California Railroad Company and took possession of its said leasehold estate therein subject and subordinate to the rights of your orator and the burden of its said telegraph line upon the said right of way.

Your orator charges that the Oregon and California Railroad Company the predecessor in interest of said defendant, was originally one of the so-called Land Grant Railroads, in that its construction was aided by the grant of public lands by the United States Govern-

ment pursuant to an act of Congress entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad in California to Portland in Oregon," approved July 25th, 1866. That in accepting said land grant the said predecessor in interest of said defendant did so subject to the conditions imposed by the so-called "Post Roads Act," and accepted the same with all the burdens imposed by law and that the said defendant Southern Pacific Company, took its said leasehold estate subject to all the burdens imposed by law upon its said predecessor in interest.

Your orator further charges that the said telegraph line of your orator does not in any way interfere with the operation of the railroad of the said defendant Southern Pacific Company, and that your orator is now and ever has been ready and willing, whenever any portion of said right of way where your orator's poles are erected and its telegraph line constructed is in good faith actually needed by the said defendant, for railroad purposes, on reasonable notice, and at its own expense, to remove said poles to such other portion of said right of way as shall be designated by the said defendant and your orator avers that if at any point the entire right of way shall be needed by said defendant for railroad purposes in the operation of its said line of railroad, then, upon reasonable notice, your orator will, at its own expense, remove its poles at such point entirely from the right of way of said defendant.

Your orator further charges that it does not seek to obstruct or curtail, and never has constructed or curtailed, or in any way interfered with the franchise and rights of the said defendant. That so much of the right of way as is and has been used by your orator has not actually been appropriated by the said defendant, and is not likely in the future to be needed by the said defendant, for railroad purposes, and is not reasonably essential to such use and that your orator's telegraph line does not interfere with the full and complete enjoyment by defendant of its franchise and property.

Your orator further charges that it has not and will not attach its wires or fixtures of any kind to any of the bridges, trestles, buildings, or structures of the said defendant, but that it has and will occupy only such portion of the right of way as has been heretofore occupied by your orator, the same not being necessary for railroad purposes, and the same not being used by the said defendant for railroad purposes.

Your orator further charges that it has duly accepted the provisions of said Act of Congress approved July 24th, 1866, entitled "An Act to aid in the construction of telegraph lines and to secure to the Government the use of the same for Postal, Military and other purposes," agreeing hereby that telegrams between the several departments of the Government and other officers and agents shall at all times have priority over all other business in their transmission over the lines of said Com-

pany and that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General.

Your orator further charges that as provided by said last mentioned Act approved July 24th, 1866, your orator has the right to construct, repair and maintain its said telegraph line on the right of way of said defendant, said right of way being a post road of the United States as provided by Section 3964 of the Revised Statutes of the United States, your orator having accepted as hereinbefore stated the provisions of said "Post Roads Act" and your orator's said telegraph line having been so constructed and maintained and will be so maintained as not to obstruct the transaction of defendant's business or the operation of the railroad of the said defendant the Southern Pacific Company, your orator thereby has the right to enjoy its said telegraph line and to maintain, use and operate the same without hindrance or molestation from the said defendant.

Your orator charges that its title to said telegraph line and its right to maintain the same, and to string such wires on the cross-arms of its telegraph poles as shall meet the necessities of its business, and its right to reconstruct said telegraph line whenever it shall be necessary is absolute both in law and in equity, and that your orator has the undoubted right to maintain, operate, reconstruct, improve and repair its said telegraph line as in its judgment it may deem proper so long as your orator

does not interfere with the operation of defendants' said railroad, and does not change the location of its telegraph poles which it will not do, and that your orator has the right to do so without the payment of any compensation whatsoever to the said defendant: nevertheless, your orator being desirous of doing equity in the premises, submits to the Court whether in good conscience it ought or should pay any compensation to said defendant, and pursuant thereto, without waiving any of its rights, now offers as a gratuity to said defendant the sum of One Dollar per mile for the land on said right of way of said defendant occupied by your orator's said telegraph poles and the cross-arms on its said telegraph poles.

Your orator further charges that by reason of the lapse of time and the natural wear and tear of the elements and in order to properly handle and care for the business intrusted to it by the public and the United States Government it is necessary that your orator's said telegraph line be at once reconstructed and your orator's said telegraph poles on said right of way and your orator's said cross-arms where they overhang said right of way be removed and new poles and cross-arms planted and installed in lieu thereof, and that new and additional wires be strung thereon; and your orator charges that the condition of said telegraph line is such, owing to the wear and tear of the elements, that it is imperative that the same be repaired and reconstructed before the rigors of winter set in, that your orator may properly transmit the telegraph messages intrusted to its care.

Your orator further charges that the right to maintain the said telegraph line of your orator upon the said right of way is valuable, exceeding in value the sum of Two Thousand Dollars, and that the actual money value of the thing in controversy herein exceeds the sum of Two Thousand Dollars, exclusive of interest and costs. Your orator charges that in conversation with the Assistant General Manager of the defendant Southern Pacific Company, your orator through its duly authorized agent called attention to its purpose and desire to repair and reconstruct its said telegraph line, whereupon the said agent and representative of defendant Southern Pacific Company announced defiantly to your orator's said agent, that if your orator made any attempt to repair or reconstruct said telegraph line where the same was located on said railroad right of way or where the cross-arms overhang said right of way, there would be "something doing," then and thereby meaning that the said defendant Southern Pacific Company would prevent your orator by force and violence, if need be, from repairing and reconstructing said telegraph line; nevertheless, on or about the 25th day of July, 1911, your orator by its agents and servants proceeded about the work of repairing and reconstructing said telegraph line upon said right of way as hereinbefore described and proceeded to remove from said right of way the worn telegraph poles and cross-arms and to plant in the place thereof new poles and to fasten thereon cross-arms and to string thereon a sufficient number of wires to do the business intrusted to your orator. That your orator

proceeded about said work in a careful manner and did not in any way interfere with the said defendant, or with the agents or servants of the said defendant, or with the operation of said railroad of the said Southern Pacific Company; and your orator alleges that it proceeded to plant its new poles in identically the same portions of ground that had been occupied by the old and worn poles of said telegraph line. That it extended its cross-arms in such a way as not to interfere with the operation of said railroad, and that it pursued its said work with due care and in good faith and with a full and just regard for the rights of the said defendant and thus proceeded to reconstruct its said telegraph line as in equity and good conscience it had a right to do, and your orator well hoped that no dispute would have arisen touching the right of your orator to reconstruct and maintain its said telegraph line but that the said defendant would have yielded to the manifest right of your orator as in conscience and equity it ought to have done.

But now, so it is, may it please your honors, that the said Southern Pacific Company, combining and confederating with divers persons unknown to your orator, whose names when discovered your orator prays it may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving now to wrong and injure your orator in the premises, and pursuant to its said threats in the nighttime of the 28th July, 1911, sawed off ninety of the new cross-arms which your orator had attached to its telegraph poles in the course of work of repairing said telegraph line where

the same overhung the said right of way and detached the wires of your orator's telegraph line, and greatly damaged and injured your orator's telegraph line, and put your orator to great inconvenience in the transaction of its business of transmitting telegrams over its said telegraph line, and the said defendant Southern Pacific Company has ordered and commanded that your orator cease all work of reconstruction of said telegraph line, and threatened to and still does threaten that if your orator proceeds to reconstruct said telegraph line, or any part thereof, as herein set forth, or to do anything toward repairing the wear and tear occasioned by the elements, that the said defendant Southern Pacific Company will destroy the same so fast as your orator proceeds with its said work, and that said Southern Pacific Company will with force and violence remove from the said right of way all servants and agents of your orator engaged in the work of reconstructing said telegraph line; and your orator charges that unless prevented by this Court that the said Southern Pacific Company will carry said threats into execution and prevent your orator from repairing, improving or reconstructing said telegraph line.

Your orator further charges that in order to properly transmit the telegraph messages intrusted to it for transmission by the public and the United States Government the said telegraph line must be at once reconstructed and repaired as herein set forth. That the said telegraph poles and cross-arms thereon, to which your

orator's said telegraph wires are attached, are so worn and weakened by the elements that unless the said telegraph line is forthwith repaired and reconstructed by the planting of new telegraph poles and the attachment of new cross-arms that there is great danger that the storms and winds of winter will cause the said poles to fall and your orator's telegraph system, both state and interstate, be interrupted and great damage done to your orator and its patrons.

Your orator further charges that unless the said defendant is restrained during the pendency of this case by the injunction of this court from interfering with said telegraph line, and from interfering with your orator in its work of repairing the same, that your orator will be prevented from making said necessary repairs, and will thereby suffer great damage. Your orator charges that it is necessary, in order to protect said property, and to continue your orator's said business, that it be allowed to proceed at once without interference from the said defendant, and your orator charges that by reason of the wrongful and unlawful acts of the said defendant, Southern Pacific Company and its threats and purpose to destroy your orator's property if your orator continues its work of repairing said telegraph line that in order to prevent irreparable injury resulting from the destruction of its property and the interference of its business by the said defendant, Southern Pacific Company, your orator has been compelled to cease and has ceased its said work of repairing said telegraph line,

thereby causing great cost and expense to your orator, and your orator cannot safely proceed with its said work unless said defendant be restrained by the order of this Court and prevented from carrying the said threats into execution and your orator charges that great damage is occasioned by the delay in the repair of said property caused by the wrongful act of said Southern Pacific Company, and that the said damage cannot be estimated in dollars and cents.

Your orator further charges that the said defendant sometimes alleges and pretends that your orator has no right whatsoever upon said right of way, and that the said telegraph line is allowed there simply through the sufferance and permission of the said defendant, and at other times the said defendant alleges and pretends that your orator constructed its said telegraph line on said right of way under the license and permission of the said defendant's said predecessor in interest, and that it has continued thereon from year to year solely by permission of said defendant Southern Pacific Company, whereas, your orator charges the contrary to be the truth, and alleges that it entered upon said right of way without the permission or consent of the said defendant, or its predecessor in interest more than twenty-four years ago, and that your orator has continued there ever since in open, hostile, and continuous possession, and the possession of your orator and of its predecessor in interest has been as hereinbefore stated, adverse, continuous, and uninterrupted, and with the full knowledge

and acquiescence of said defendant for more than twenty-four years, all of which said acts and doings and pretenses of the said defendant is contrary to equity and good conscience, to the manifest wrong, injury and oppression of your orator in the premises.

In consideration whereof, and for as much as your orator is entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable to the end, therefore, that the said defendant may, if it can, and the rest of the confederates, when discovered, may upon their several and respective corporal oaths full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged as fully and particularly in every respect as if the same were here again repeated and they thereunto particularly interrogated, and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief, and that the said defendant, its servants, agents and attorneys, and each of them, may, by the rule of this court, be required to show cause upon a day to be named therein, why an injunction should not issue pending this case, and in the meantime that said defendant, its servants, agents, employes and each of them, be restrained from in any way interfering with your orator's said telegraph line, or in any way interfering with your orator and its agents and servants in its work of repair-

ing the said telegraph line until the further order of this court, and that on the final hearing the said defendant, by the injunction of this court, be forever enjoined and restrained from in any way interfering with your orator's said telegraph line, or with your orator and its agents in the reconstruction, repair and improvement and maintenance of its said telegraph line as herein set forth and that your orator may have such further and other relief in the premises as the nature of this case shall require and to your Honors may seem meet.

May it please your Honors to grant unto your orator the writ of subpoena of the United States of America, to be directed to the said Southern Pacific Company, a corporation, and the rest of the confederates when discovered, thereby commanding them, and every of them, at a certain day and under a certain penalty, therein to be inserted, personally to be and appear before this Honorable Court, and then and there to answer all and singular the premises, and to stand to, abide by and perform such order and decree therein as shall be agreeable to equity and good conscience.

And may it please your Honors, the premises being considered, to require the defendant, under a rule of this court, to show cause on a date to be named, why there should not be granted to your orator during the pendency of this case the injunction of this court directed to the said defendant, and commanding the said defendant, its servants, agents, employes and attorneys, and each of them, to absolutely desist and

refrain from in any way interfering with your orator's telegraph line, as hereinbefore described, and to desist and refrain from in any way interfering with your orator, its servants, agents, and employes in their work in repairing and reconstructing said telegraph line until the further order of this court, and that pending the hearing of said rule to show cause, that the said defendant, its servants, agents and employes be restrained as herein prayed from in any way interfering with your orator's telegraph line or with your orator's servants, agents and employes in their work of reconstructing and repairing said telegraph line.

And may it please your Honors on the final hearing to grant unto your orator the people's writ of injunction to be directed to the said Southern Pacific Company, a corporation, forever restraining said defendant and its agents, servants, attorneys and employes from in any way interfering with the telegraph line of your orator on said right of way between the town of Eugene, in the State of Oregon, and the station of New Era, in the State of Oregon, and commanding said defendant, its servants, employes, agents and attorneys to absolutely desist and refrain forever from interfering with your orator, its agents and servants in the repair, maintenance, reconstruction and improvement of its said telegraph line, and to absolutely desist and refrain forever from in any way intermeddling with or injuring or interfering with any part of said telegraph line, or any part of the same as recon-

structed, repaired or improved by your orator, and that your orator recover its cost herein to be taxed, and have such other relief as shall be agreeable to equity and good conscience.

**ROGER B. SINNOTT and
LORING K. ADAMS,**

Chamber of Commerce Building, Portland, Ore.

**O. W. POWERS and
THOS. MARIONEUX,**

Kearns Building, Salt Lake City, Utah.

Solicitors for Complainant.

(Indorsed) Bill of Complaint

Filed Aug. 25, 1911.

G. H. MARSH, Clerk.

By J. W. Marsh, Deputy.

And afterwards, to wit: on the 16th day of October, 1911, there was duly filed in said Court, an answer, in words and figures as follows, to wit:

[ANSWER OF SOUTHERN PACIFIC CO. TO
ORIGINAL BILL.]

(Title)

Defendant, Southern Pacific Company, for its answer to the complaint of plaintiff, Postal Telegraph Company, admits, alleges and denies, as follows:

I.

Said defendant admits all that portion of the complaint of plaintiff herein, commencing with the word "that" in line ten of page one of said complaint, to and including the word "miles" in line eighteen of page one of said complaint; but the defendant denies that upon a part of the said right of way or upon any portion thereof the plaintiff above named maintains a telegraph line, the same being a portion of the telegraph line extending through the states of California, Oregon, Washington and other states of the Union, or elsewhere.

II.

Said defendant admits all that portion of the complaint of plaintiff herein commencing with the word "and" in line twenty-two of page one of said complaint, to and including the word "way" in line twenty-eight of page one, of said complaint.

III.

Said defendant admits that the Pacific Postal Telegraph-Cable Company was and is a corporation organized and existing pursuant to the laws of the State of New York, and that the said last named corporation is the predecessor of the plaintiff above named; said defendant denies that more than twenty years ago, or at any time, the Pacific Postal Telegraph-Cable Company had duly or at all accepted the provisions of the Act of Congress, commonly called the Post Roads.

IV.

Said defendant denies that the Pacific Postal Telegraph-Cable Company constructed a telegraph line along or upon said right of way of the said defendant, or that it erected poles or attached thereto cross-arms or strung wires on said cross-arms for the speedy or other transmission of telegraph messages, or any messages for the Government, or for private individuals, or for any person, corporation or individual, or at all, except in the manner and under the circumstances as hereinafter alleged.

V.

Said defendant admits that some of the poles of the telegraph line constructed by the said Pacific Postal Telegraph-Cable Company, in the manner and under the circumstances hereinafter alleged, between the town of Eugene and the station of New Era, Oregon, are

not on the right of way of the said defendant, and admits that some of said poles were planted, as aforesaid, on lands adjoining said right of way, and that in some places between the town of Eugene and the station of New Era, aforesaid, the cross-arms and wires attached to the said telegraph poles, constructed in the manner and under the circumstances aforesaid, overhang the right of way of the said defendant herein; but the said defendant alleges that each and all of the said telegraph poles and cross-arms and wires attached thereto which were in fact constructed and erected on the right of way of the said defendant, were so constructed and erected under express permission on the part of the said defendant, as hereinafter alleged, and not otherwise.

VI.

Said defendant denies that the predecessor of plaintiff, the said Pacific Postal Telegraph-Cable Company, or any corporation, person or individual, erected said poles, or any of them, or attached thereto said or any overhanging cross-arms, or stretched thereon the said or any telegraph wires upon said railroad right of way, or any portion thereof, without any permission from the said Southern Pacific Company, or its predecessor in interest, the said Oregon & California Railroad Company, or either of them, or without any license from the said defendant or its said predecessor in interest, or that ever since the erection of the poles or cross-arms, or either or any thereof, or the stringing of the wires, or

any thereof of the said or any telegraph line more than twenty years ago, or for any time, that the possession of the said plaintiff, or of its predecessor in interest, the said Pacific Postal Telegraph-Cable Company, or either thereof, has been open, notorious, peaceable, adverse, continuous or uninterrupted, or with the full knowledge and acquiescence of said defendant, Southern Pacific Company, or its said predecessor in interest, or that the said plaintiff has the right in law or equity, or at all, to maintain, use, repair, reconstruct, improve or enjoy its said telegraph line, or any telegraph line erected thereon, as aforesaid, or to add, from time to time, as business increases, or otherwise, such additional or any wires as are necessary, or at all, to accommodate the Government of the United States and the public, or any corporation, person or individual; and denies that the said poles, cross-arms or wires, or either thereof, were erected or strung on the said right of way of the said defendant, except in the particular manner, and under the particular circumstances hereinafter alleged; and the said defendant denies that the possession of the said plaintiff or of its said predecessor, the Pacific Postal Telegraph-Cable Company of the said right of way of the defendant, or any part or portion thereof, has been other than by mere permission of the said defendant and its said predecessor in interest.

VII.

Said defendant admits that on or about the first day of August, 1887, that said Oregon and California Rail-

road Company transferred and leased to the said defendant its said right of way, property and franchises in the State of Oregon, for the term of forty years, and that thereupon the said defendant entered into possession of the said right of way, property and franchise leased to it as aforesaid; but the said defendant denies that at the time the said Southern Pacific Company so entered upon the said right of way and took possession of the leasehold interest therein acquired as aforesaid from the said Oregon & California Railroad Company, or at any time, the telegraph line of the said plaintiff, or any telegraph line was built thereon, or that for a long time prior thereto, or any time, had been built and maintained thereon, except by the permission of the said Oregon & California Railroad Company and the said defendant, as hereinafter alleged; and the said defendant denies that it entered upon the said right of way of the said Oregon & California Railroad Company, or took possession of its said leasehold estate therein subject to and subordinate to the rights of the plaintiff, or any corporation, person or individual, or subject to the burden of the said telegraph or any telegraph line upon the said right of way or any part thereof.

VIII.

Said defendant admits that the Oregon & California Railroad Company, its predecessor, was the original owner of what was and is known as the land-grant railroads, in that its construction was aided by a grant of

public lands by the United States Government pursuant to an act of Congress, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Oregon," approved July 25, 1866, and acts amendatory thereof; but the said defendant denies that in accepting said land grant the said Oregon & California Railroad Company did so subject to the conditions imposed by the so-called Post Roads act, or subject to any conditions except as are enumerated and stated in the said land-grant acts and acts amendatory thereof, or that it accepted the same with any of the burdens imposed by law or otherwise, except as mentioned in the said land-grant act, or that the said defendant, Southern Pacific Company, took its leasehold estate subject to all or any of the burdens imposed by the act known as the Post Roads act, or subject to all or any of the burdens imposed by any law, except the provisions of the said land-grant act and acts amendatory thereof.

IX.

Said defendant admits that the said plaintiff and its predecessor agreed to remove all poles from the right of way of the said defendant within a reasonable time after notice to remove the same; but the said defendant denies that such telegraph line of the said plaintiff does not in any way interfere with the operation of the railroad of the said defendant, Southern Pacific Company, and denies that the said plaintiff is now

or ever was ready or willing, whenever any portion of said right of way where plaintiff's poles were or are located or its telegraph line constructed in the manner and under the circumstances hereinafter alleged is, in good faith, actually needed by the said defendant for railroad purposes on reasonable or any notice, at its own expense, or otherwise, or that the said plaintiff is ready or willing to remove said poles from the said right of way of the said defendant; but the said defendant alleges that, although the said erection of the said poles, cross-arms, and the stringing of the said wires thereon was begun under the permission of the predecessor of the said defendant, yet the said plaintiff now refuses to remove the same from the said right of way of the said defendant herein.

X.

Said defendant denies that the said plaintiff does not seek to obstruct or curtail, or that it never has obstructed or curtailed, or in any way interfered with the franchises and rights of the said defendant; and denies that so much of the right of way of the said defendant as is or has been used by the plaintiff under the permission of the defendant, and its predecessors, as hereinafter alleged, is not and has not actually been appropriated by the said defendant, or that it is not likely in the future to be needed by the said defendant for railroad purposes, or that it is not reasonably essential to such use, or that the said telegraph line does not

interfere with the full and complete enjoyment by the said defendant of its franchise and property; but, on the contrary, the said defendant alleges that the said plaintiff is now seeking to obstruct and curtail and to interfere with the franchise and the rights of the said defendant; and further alleges that the right of way which is in use and has been used by the plaintiff under the permission of the said defendant and its predecessor, as hereinafter alleged, is now and will be in the future needed by the said defendant for railroad purposes, and is now and will be reasonably essential to defendant for such use, and the said telegraph line interferes with the full and complete enjoyment by the defendant of its said franchise and property.

XI.

The said defendant denies that the plaintiff has not or will not attach its wires and fixtures to the bridges, trestles, buildings and structures of the said defendant, and denies that the said plaintiff has not and will not occupy only such portion of the right of way of said defendant as has been heretofore occupied by permission, as hereinafter alleged, or that it is not or will not occupy any of said right of way except such portion as is not necessary for railroad purposes or such as is not used by the said defendant for railroad purposes; and denies that the said plaintiff has duly or at all accepted the provisions of the said act of Congress approved July 24, 1866, entitled "An Act to aid in the construction of telegraph lines, to secure for the Gov-

ernment the use of the same for postal, military and other purposes," or that the said plaintiff has agreed that telegrams between certain departments of the Government, or its officers, shall at all or at any time have priority over all or any other business in transmission over the lines of the said plaintiff, or that the charges for such telegrams shall not exceed the rates annually fixed by the Postmaster General, or otherwise, or that, as provided by said last mentioned act, approved July 24, 1866, or any act of Congress, the said plaintiff has the right to reconstruct, repair or maintain its said or any telegraph line on the right of way of said defendant, or that said right of way as a Post Road of the United States is provided by Section 3964 of the Revised Statutes of the United States, or by any statute or law of the United States, or that the said defendant has accepted the provisions of the said Post Roads act, or that the said telegraph line has been so constructed or maintained, or will be so maintained so as not to obstruct the transaction of defendant's business or the operation of the said railroad of the defendant, or that the said plaintiff has the right to enjoy its said telegraph line or any telegraph line, or to maintain, use or operate the same without hindrance to or molestation from the said defendant, or at all, except under and by virtue of the permission granted by the said defendant and its predecessor; and the said defendant denies that plaintiff's title to said telegraph line, or its right to maintain the same, or to string the said wires on the cross-arms or its telegraph poles as shall meet the necessities

of its business, or its right to reconstruct the said telegraph lines whenever it shall be deemed necessary, is absolute, both in law or in equity, or that it has any right or title to said telegraph line, or to maintain the same, or to string wires on the cross-arms of its said telegraph poles, except under and by virtue of the permission temporarily granted, as aforesaid, or that the said plaintiff has the undoubted or any right to maintain, operate, reconstruct or repair its said telegraph line as in its judgment it may deem proper or at all, except under and by virtue of the said permission temporarily granted as aforesaid, or that the said plaintiff has the right to do so without the payment of any compensation whatsoever, to the said defendant; but on the contrary the said defendant alleges that the right of way of the said defendant is its private property, and that the same cannot be taken or appropriated or used in any manner by the said plaintiff for public use without just compensation, and the same cannot be taken for private use at all, as is sought by the said plaintiff herein.

XII.

Said defendant denies that by reason of the lapse of time or the natural wear and tear of the elements, or in order to properly handle or care for the business intrusted to the plaintiff by the public or the United States Government, or that at all, it is necessary that the said plaintiff's said telegraph line be at once or at all reconstructed or that plaintiff's said telegraph poles

on said right of way, or that the said cross-arms on said poles where they overhang the said right of way, be removed, or that new poles or cross-arms be planted or installed in lieu thereof, or that new or additional wires be strung thereon, or that the condition of the said telegraph line is such, owing to the wear and tear of the elements, or otherwise, that it is imperative, or at all necessary that the same be repaired or reconstructed before the rigors of winter set in, or at all that plaintiff may properly, or at all, transmit the telegraph messages entrusted to its care.

XIII.

Said defendant admits that the right to maintain said telegraph line of plaintiff upon said right of way is valuable and exceeds in value the sum of two thousand dollars, and that the actual money value of the thing in controversy herein exceeds the sum of \$2,000.00 exclusive of interest and costs.

XIV.

Said defendant admits that it notified said plaintiff that it would prevent plaintiff, by all reasonable means, repairing and reconstructing said telegraph lines; and admits that on or about the 25th day of July, 1911, plaintiff, by its agents and servants, proceeded to repair and reconstruct said telegraph line upon such right of way and proceeded to remove from said right of way all worn telegraph poles, and cross arms, and to plant in place thereof new poles and to fasten thereon cross

arms and to string thereon wires; and said defendant denies that said plaintiff proceeded about said work in a careful manner or that it did not in any way interfere with defendant or its agents or servants, or with the operation of the said railroad of defendant; and denies that plaintiff proceeded to plant its new poles in identically the same portion of ground that had been occupied by the old or worn poles of the said telegraph line; and denies that plaintiff extended its cross arms or said poles in such a way as not to interfere with the operation of said railroad, or that it pursued its said work with due or any care, or in good faith, or with full or just regard of the rights of defendant, or that it proceeded to reconstruct its telegraph line as in equity and good conscience it had a right to do; but the said defendant alleges the facts to be that on or about the 25th day of July, 1911, the plaintiff, by its servants and agents, proceeded to erect new poles and cross arms upon the right of way of the said defendant and proceeded to put the said cross arms on the said poles in such a manner that the same overhung and extended over the right of way of the said defendant, and the wires when strung thereon would extend over the right of way of the said defendant, and proceeded to erect said poles, cross-arms and wires in such manner as to interfere with the right of way of said defendant and the use thereof by said defendant, and in such manner as to interfere with and obstruct said defendant in the operation of its said railroad.

XV.

Said defendant admits that on July 28th, 1911, it sawed off, or caused to be sawed off, some of the new cross arms which plaintiff had attached to its telegraph poles in the course of the work of erecting new poles on the right of way of the said defendant where the same overhung said right of way of the said defendant, and that it detached the wires of plaintiff's telegraph line from the said cross arms where the same overhung the right of way of the said defendant; but said defendant denies that it greatly or at all damages or injured plaintiff's telegraph line, or put plaintiff to great or any inconvenience in the transaction of its business of transmitting telegrams over its said telegraph line; and the said defendant admits that it has ordered and commanded that plaintiff cease all work of reconstruction of said telegraph line wherever the same is erected upon the right of way of said defendant and wherever the cross arms or wires overhang or extend over the right of way of said defendant; and admits that it has notified the said plaintiff that it will remove from the said right of way all new poles erected on the said right of way and all cross arms and wires which overhang and extend over the said right of way, and that it will prevent the said plaintiff or its agents or servants from erecting or reconstructing new poles or cross arms over its said right of way; but the said defendant alleges that under and by the terms of the said permission temporarily granted by the said defendant and its predecessors, it,

the said defendant, has the right to prevent the construction and erection of the said poles of the plaintiff and the cross arms and wires thereon wherever the same is on or overhangs or extends over the right of way of the said defendant, and by virtue of the said permission temporarily granted, as aforesaid, it has the right to prevent plaintiff, its agents or servants from entering upon said right of way for the purpose of erecting the said poles, cross arms, or wires upon said right of way.

XVI.

The said defendant denies that in order to properly or at all transmit telegraph messages entrusted to it for transmission by the public or the United States Government, or any corporation, person, or individual, the said telegraph line, or any part thereof, must be at once reconstructed or repaired upon the right of way of said defendant, or as alleged in the complaint of plaintiff herein, or at any place upon the right of way of this defendant; and defendant denies that the said telegraph poles or cross arms thereon are so worn or weakened by the elements, or otherwise, that unless said telegraph line is forthwith repaired or reconstructed by the planting of new telegraph poles or the attachment of new cross arms, that there is great or any danger that the storms or winds of winter will cause the said poles to fall or that the plaintiff's telegraph system, both state and interstate, will be curtailed or great damage done to plaintiff or its patrons, or any person.

XVII.

Said defendant denies that unless defendant is restrained during the pendency of this cause by the injunction of this court from interfering with said telegraph line, or from interfering with plaintiff in its work of repairing the same that plaintiff will be prevented from making said necessary repairs or will thereby suffer great or any damage.

XVIII.

Defendant denies that it is necessary in order to protect said property or to continue plaintiff's said business that it be allowed to proceed at once, or at all, without interference from said defendant, or that by reason of the wrongful or unlawful acts or any acts of the defendant, or its alleged threats or purpose to destroy plaintiff's property if the plaintiff continues its work of repairing said telegraph line, or in order to prevent irreparable or any injury resulting from the alleged destruction of its property or the alleged interference with its business by the said defendant, plaintiff has been compelled to cease or has ceased its said work of repairing said telegraph line, thereby or at all causing great or any cost or expense to plaintiff, or that plaintiff cannot safely proceed with its said work unless said defendant be restrained by the order of this court, or prevented from carrying its alleged threats into execution, or that great damage is or will be occasioned by delay or that there will be any delay in the repairing of said property

caused by the said wrongful or any act of the said defendant, or that the said or any damage cannot be estimated in dollars and cents; but on the contrary the said defendant alleges that the said plaintiff has not suffered nor will it suffer any injury whatever by reason of the acts of the said defendant in preventing the erection of the said poles, cross arms and wires on its said right of way, and alleges that said plaintiff has suffered no damage whatever by the said acts of the said defendant.

XIX.

Said defendant admits that it had at all times and has at all times claimed that plaintiff had and has no right whatever upon said right of way except by the permission temporarily granted by the said defendant and its said predecessor, and admits that the said telegraph line of plaintiff is allowed on said right of way simply through the permission of the said defendant; and admits that at all times the said defendant has claimed and now claims that plaintiff constructed its said telegraph line on said right of way under the allowance and permission of the said defendant and its predecessor, and that the plaintiff and its predecessor has continued thereon from year to year simply by the permission of this defendant and its said predecessor; but this defendant denies that plaintiff entered upon the said right of way without the permission or consent of the defendant or its predecessors in interest more than twenty years ago, or at any time, or that plaintiff has continued on

said right of way ever since, or at all, in open, hostile, or continuous possession, or without compensation of plaintiff or of its predecessor in interest, or has been or is in adverse, continuous or uninterrupted possession for more than twenty-four years, or for any time, with the full or any knowledge or acquiescence of the said defendant or its predecessor; or that the said or any acts or doings of the said defendant or its predecessors is contrary to equity or good conscience, to the manifest or any wrong or injury or opposition of plaintiff.

(Endorsed) Answer filed Oct. 16, 1911.

G. H. MARSH, Clerk.

Said defendant for a first, further and separate answer and affirmative defense herein, alleges:

I.

That in the month of November, 1886, and while the Oregon & California Railroad Company, the predecessor of this defendant, was in the hands of a receiver of the above entitled court, the Pacific Postal Telegraph-Cable Company, mentioned in the complaint herein as the predecessor in interest of the plaintiff herein, presented to the Circuit Court of the United States for Oregon a petition in writing asking that it be allowed to place upon the right of way of the said Oregon & California Railroad Company certain poles, cross arms and wires on the condition and with the express understanding that said Pacific Postal Telegraph-Cable Company should allow the same to remain upon the said right of way for such time as said receiver should be in possession of said road and so long as said receivership should be in

force, and at all times by sufference and permission of said court and its receiver; that a copy of said petition so presented as aforesaid, is in words and figures as follows:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

AMENDED PETITION OF THE PACIFIC
POSTAL TELEGRAPH-CABLE COMPANY
IN RE THE OREGON & CALIFORNIA
RAILROAD COMPANY (R. Koehler, Receiver).

To the Honorable Matthew P. Deady, Judge of the said Circuit Court of the United States for the District of Oregon:

Your petitioner, the Pacific Postal Telegraph-Cable Company, respectfully represents as follows:

Petitioner is a corporation, duly incorporated under the laws of the State of New York, and is engaged in constructing a line of telegraph from Port Moody, in British Columbia, through Washington Territory and the State of Oregon to San Francisco, California, connecting with a transcontinental telegraph and a cable across the Atlantic Ocean. In constructing said line from Portland to the southern boundary of the State of Oregon, it is desirable and necessary that petitioner be allowed to place its poles and wires upon the right of

way of the Oregon & California Railroad, for the following reasons: at various points and in various districts or neighborhoods along the contemplated line of said telegraph, and near the right of way of the Oregon & California Railroad Company, petitioner is unable to procure from the private owners of land adjoining or near said right of way of said railroad, a right of way for said telegraph, though it has offered to said owners fair and reasonable compensation, and has proposed to submit the question of damages and condemnation of the land to arbitration, as provided by the laws of Oregon; and said private owners have refused and still refuse to permit petitioner to go upon their said lands, and to appoint any arbitrators or enter into any proceedings for the condemnation of said lands. Under the laws of Oregon in reference to the construction of telegraph lines, petitioner has no clear remedy to meet such an exigency, as there is no method of proceeding distinctly pointed out by said laws, or any laws of said state, in the event of the refusal of a private owner of land to appoint an arbitrator. This difficulty is more particularly encountered in the following localities, to wit: From Portland, Oregon, fifteen miles south to Oregon City; and from a point near Eugene City to Goshen; and from the station of Yoncalla, on said railroad, to Roseburg; and within a district about one mile in length, along and near said railroad and near the station of Woodburn, on said railroad; and at a few minor points of very limited extent, say two or three poles each. Petitioner states that the district and points mentioned are

not intended to be represented as wholly beyond the power of petitioner to cross by making private arrangements with the owners of the land, but that they include the points of difficulty, where it has been impossible to arrange with the owners.

Petitioner further states that at and near the railroad bridge across the Willamette River, on the line of said railroad, the natural and topographical difficulties are such that it is desirable to petitioner, and will save petitioner great expense, to be allowed to place its wires upon said bridge.

Petitioner further states that a great part of its said line has been constructed through the State of Oregon, without going upon the right of way of said railroad company, except at a point south of Roseburg, where it was found necessary to place twelve poles in said right of way, and that it is not the intention of petitioner to place its poles upon said right of way, except at points where there is a strong necessity for it.

Petitioner further states that the use which it contemplates of said right of way and of said bridge, will in no way interfere with the operation of said railroad company, or do it any damage; but that if, in the opinion of your honor and of the receiver of said railroad company, any damages will accrue to said railroad company by the use of its right of way, and of said bridge, as above suggested, petitioner is ready and willing to have the damages assessed as provided in Chapter 58 of

the Miscellaneous Laws of Oregon, Code page 773, and is ready and willing to make any and all just and reasonable compensation to said railroad company for any use petitioner may make of said right of way or bridge.

And petitioner expressly stated that this petition is based upon the understanding and agreement on its part,—and that any privileges granted to petitioner hereunder will be by petitioner accepted under the express condition and proviso—that the privileges so granted are to be temporary only, and are not to extend beyond the period of the present receivership of said railroad company, or the period during which the said railroad company remains in charge and under the control of this honorable court.

And petitioner further states that it is exceedingly anxious to complete its said telegraph line; that it has large numbers of men and quantities of materials at various points along the line of said road, awaiting the decision of this honorable court in this matter to commence operations; and that unless the difficulties enumerated above be overcome, petitioner will be greatly delayed in the construction of said telegraph line, and thereby materially injured.

WHEREFORE petitioner prays for an order upon R. Koehler, receiver of said railroad company, to allow petitioner the use of said bridge and of said right of way, as hereinbefore set out, and also to allow the said twelve poles to remain where they have been placed, and for such other order as the circumstances and the inter-

ests may require.

WILLIAMS, ACH & WOOD,

Attorneys for Petitioner.

That the said petition was duly verified as required by law.

That on the first day of September, 1886, the above entitled court, acting through the Honorable Matthew P. Deady, then the judge of said court, made and entered an order under said petition in writing, in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT
OF OREGON.

In the Matter of R. Koehler, Re-) No. 1109.
ceiver of the Railways of the Ore-) December 1, 1886
gon and California Railway Com-) Petition of the Pacific Pos-
pany, Petition of the Pacific Pos-) tal Telegraph-Cable Company.)

This matter came on to be heard upon the petition, the affidavit of Henry Rosener and counter affidavit of R. Koehler, Receiver of said Railway Company, and the amended petition, and having been heard by the court, and argued by Mr. C. E. S. Wood, of counsel for the petitioner, and Mr. John W. Whalley, of

counsel for the Receiver, and the Oregon and California Railway Company; and the court being fully advised in the premises; It is hereby **ORDERED** that the petitioner, the Pacific Postal Telegraph-Cable Company be permitted to place and erect its poles, wires and necessary materials for the construction of its telegraph line at or near the dividing line between the right of way of the said Railway Company and the private property along the same, and upon said right of way, as follows, to wit: At all or any points along the line of said railway where the petitioner finds it difficult or impossible to secure a right of way for its telegraph line from the private owners of the lands, because of their refusal to accede to reasonable terms or to appoint an arbitrator, as by the laws of Oregon provided in such cases, more particularly at the places mentioned in the amended petition herein, to wit: From Portland, Oregon, south fifteen miles to Oregon City; and from a point near Eugene City to Goshen; and from the station of Yoncalla on said railway, to Roseburg, and from about one mile in length near the station of Woodburn on said railroad; and that said petitioner be also permitted to run its telegraph wire, with the necessary appurtenances, across the Willamette River, on the bridge of said railway company across said river near the station of Harrisburg, and that the twelve poles already placed by petitioner upon land which is in dispute as between said railway company and the alleged private owner thereof, be permitted to remain upon said land, so far as

the title of said railway company to said land may be concerned; but nevertheless this order is upon the express condition that the petitioner, in availing itself of the privileges hereby granted, to it, of going upon the right of way of the said railway company, and using the said railway bridge in the construction of its telegraph line, shall in no way interfere with the operations of the said railway company, nor cause said company any material damage or inconvenience, and that said privileges are granted merely for the time being, and shall not in any event, extend beyond the period during which the said railway company remains in the charge and under the control of this court, by reason of the present receivership.

(Signed) Deady, J.”

That such occupancy as the plaintiff and its predecessor the Pacific Postal Telegraph-Cable Company has made at all the times herein mentioned of the said right of way of the said Oregon & California Railroad Company, and the occupancy and alleged possession of said right of way, as alleged in the complaint herein, was taken under the permission granted in said order of the said court, as hereinbefore set out and not otherwise. That at the close of the said receivership of said railroad the said Pacific Postal Telegraph-Cable Company, the predecessor of plaintiff, was allowed to maintain certain poles and overhanging cross arms on the said right of way of the said defendant and its predecessor between New Era and Eugene, Oregon, by mere permission and

sufferance of the said defendant and the said poles and overhanging cross arms over said portion of said right of way were allowed to so remain by the said defendant and its predecessor for the reason that there was no desire on the part of the said defendant or its said predecessor to revoke the permission which had been given to the said Pacific Postal Telegraph-Cable Company under said order to so occupy temporarily the said portion of the said right of way between the station of New Era and the town of Eugene, Oregon.

II.

That continuously for more than five years prior to this time the railway lines of the said defendant and over the said right of way of the said Oregon & California Railroad Company in the State of Oregon and particularly between New Era and Eugene, Oregon, has largely increased and the necessity for the use of the entire right of way for railroad purposes, including the space which had been permissively occupied by the said plaintiff and its said predecessor have increased and the said defendant has found it absolutely necessary to install and has in fact installed a block signal system consisting of delicate electrical apparatus for the purpose of safeguarding the trains of the said defendant and protecting the lives of its passengers thereon; that said block signal system has been installed over a large part of said right of way and particularly that portion of the right of way between Eugene and New Era thereof, and is being installed over the balance thereof, and that fact, together

with other increasing uses for railroad purposes has made it and it is absolutely necessary for said defendant and its said predecessor to revoke the permission granted to the predecessor of the said plaintiff between the said station of New Era and the town of Eugene, Oregon, and the defendant and its predecessor has revoked and now revokes the said permission; and the said defendant alleges that the revocation of said permission is without injury whatever to the said plaintiff; and alleges that plaintiff can with inconsiderable expense acquire a right of way for its said telegraph line, poles, cross arms and wires on land other than the right of way of this defendant.

Said defendant for a further, separate affirmative defense to the complaint of the plaintiff herein, alleges:

I.

That the said plaintiff ought not to have or maintain this suit against the said defendant because and for the reason that the said defendant alleges that there has been a former adjudication of all of the matters and things alleged in the complaint herein and of all of the rights claimed by plaintiff in its complaint herein, and the alleged cause of suit of the plaintiff in its complaint herein is barred in that on that 25th day of October, 1907, the Pacific Postal Telegraph-Cable Company, the predecessor of the plaintiff herein, commenced a suit in the above entitled court against this defendant and its said predecessor, and filed its duly verified complaint

therein in writing, in words and figures, as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

PACIFIC POSTAL TEL-)
EGRAPH-CABLE COM-)
PANY,)
(a corporation) Plaintiff)

vs.)

OREGON & CALIFORNIA)

RAILROAD COMPA-)

NY, (a corporation) and)

SOUTHERN PACIFIC)

COMPANY (a corporation)

as Lessee of the OREGON)

& CALIFORNIA RAIL-)

ROAD.)

Defendants.)

COMPLAINT.

Comes now the plaintiff and for cause of action against said defendants in the above entitled court and cause, alleges as follows:

I.

That plaintiff is now and was at all the times and dates hereinafter mentioned a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of New York, and having its principal place of business in the City and County of New York, in said State of New York.

II.

That under and by virtue of its articles of incorporation, plaintiff duly authorized and empowered, among other things, to own, construct, use and maintain a line of electric telegraph from and between, among other places, the City of Portland, County of Multnomah, and State of Oregon, and the state line between the States of Oregon and California; that it purposes, owning, constructing, using, and maintaining such line of electric telegraph between said city and said state line, and that this cause is instituted and brought for the purpose of enabling it to obtain and secure a suitable and convenient right of way for its said line of electric telegraph between said City of Portland and said state line.

III.

That prior to instituting this cause, plaintiff duly paid to the Secretary of State of the State of Oregon the entrance fee and annual license fee required to be paid by it as a foreign corporation by the laws of the State of Oregon, and plaintiff duly filed with said Secretary of State a written declaration of its desire and purpose to engage in business with in said State of Oregon, said declaration being accompanied by a certified copy of its articles of incorporation, certified to be such copy by the legal keeper of the original, said declaration and certificate being in all respects duly and regularly made, and plaintiff duly made, executed, and acknowledged a power of attorney, and caused the same to be recorded in the office of the Secretary of State of said State of Oregon, by which said power of attorney John Annand, a resident and inhabitant of the City of Portland, County of Multnomah, and State of Oregon, was duly appointed the attorney in fact for plaintiff within said State of Oregon upon whom may be served all writs, process, and summons requisite or necessary to give complete jurisdiction of this plaintiff to any of the courts of said State of Oregon, or any of the United States courts therein, all in conformance with and as provided in the laws of the State of Oregon relating to foreign corporations doing business within said state, and that thereafter, and prior to the instituting of this cause by plaintiff the Secretary of State of said State of Oregon duly issued to plaintiff a certificate authorizing it to

transact business within said State of Oregon as provided by law, that plaintiff ever since has maintained and still maintains such agent and attorney in fact in said State of Oregon, and that it has duly and regularly and in all respects complied with the laws of the State of Oregon so as to entitle it to engage in and transact business in said State of Oregon.

IV.

That the defendant Oregon and California Railroad Company is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, and duly authorized and empowered by virtue of its articles of incorporation to own within said State of Oregon the railroad hereinafter described.

V.

That the defendant Southern Pacific Company is a corporation duly incorporated, organized, and existing under and by virtue of the laws of the State of Kentucky, and duly authorized and empowered by virtue of its articles of incorporation and the laws of the State of Oregon to lease, operate, and maintain within said State of Oregon the railroad hereinafter described.

VI.

That the above entitled cause is an action of a civil nature and that the matter in dispute in this cause exceeds the sum or value of Two Thousand Dollars

(\$2,000.00) exclusive of interest and costs, and that said cause is wholly between citizens of different states.

VII.

That said Oregon and California Railroad Company is the owner of a certain easement or right of way in the State of Oregon which extends in a general southerly direction from the City of Portland, County of Multnomah, and State of Oregon, through and across parts of the Counties of Multnomah, Clackamas, Marion, Linn, Lane, Douglas, Josephine, and Jackson, all in said State of Oregon, for a distance of Three Hundred and Sixty-Six and Sixty-one One-Hundredths miles (366.61), more or less, to the state line between the States of Oregon and California, that said right of way is One Hundred feet (100) in width, more or less, and that upon said right of way is constructed a railroad owned by said Oregon and California Railroad Company, consisting of a single track main line, the rails of which are parallel and about Four feet (4) eight and one-half ($8\frac{1}{2}$) inches apart, and switches, side tracks, spurs, turn-outs, turn-tables, water tanks, station houses, section houses, etc., that said line of railroad is located at or near the center line of said right of way aforesaid and that said right of way extends fifty feet (50), more or less, on each side of the center line of the main track of said railroad throughout its entire length from said City of Portland to said state line.

VIII.

That said Oregon and California Railroad Company has heretofore duly and lawfully leased the said railroad hereinbefore described and the said right of way hereinbefore described upon which said railroad is constructed to the defendant Southern Pacific Company, that said Southern Pacific Company is now the lessee of said railroad and said right of way hereinbefore described, and the railroad thereon and is operating the same as and for a railroad and for railroad purposes.

IX.

That at a meeting of the Board of Directors of said Pacific Postal Telegraph-Cable Company duly and regularly held on the thirty-first day of August, 1907, a resolution was duly and regularly adopted by said Board of Directors whereby it was resolved to be necessary and convenient for said plaintiff to construct a new line of electric telegraph between said City of Portland and said state line between the States of Oregon and California, and it was further resolved that the most direct, safe, and practicable post road for the construction of said line of electric telegraph is upon and along the right of way of defendants hereinbefore described, that by said resolution said plaintiff selected the right of way of said defendants from the City of Portland, County of Multnomah, and State of Oregon, to the boundary line between the States of Oregon and California, by way of Oregon City, Clackamas County; Salem, Marion Coun-

ty; Albany, Linn County; Eugene, Lane County; Roseburg, Douglas County; Grants Pass, Josephine County; and Gregory, Jackson County, a distance of Three hundred and sixty-six and sixty one-hundredths (366.61) miles, or thereabouts, as the most direct, safe, and practicable post road for the construction, maintenance, and operation of the new telegraph line of said company.

X.

That said plaintiff is engaged in business which is of great importance to the public and that it is greatly for the public use and benefit that there should be constructed, operated, and maintained by the plaintiff the aforesaid line of electric telegraph, and that it is necessary for plaintiff to construct, operate, and maintain said line of electric telegraph upon the said right of way hereinbefore described by reason of the fact that said right of way is the only practicable, direct, and safe place available to plaintiff and upon and along which it can construct its said line of electric telegraph.

XI.

That plaintiff and defendants are unable to agree upon the sum or sums to be paid to defendants by plaintiff as a proper compensation for said right of way of said plaintiff upon and along said right of way of said defendants hereinbefore described, although plaintiff has

earnestly and in good faith endeavored to reach an agreement with defendants.

XII.

That said defendants refuse to recognize the right of plaintiff to construct, maintain, and operate a telegraph line along, across, and over the right of way of the defendants, or any part thereof, and said defendants have denied that plaintiff has the right to construct, operate, and maintain its telegraph line as sought for in this cause.

XIII.

That said plaintiff is a telegraph company duly incorporated, organized and existing for the purpose of transmitting by wire dispatches, messages, news, information, and the receipt and delivery thereof by means of carriers, United States mail or otherwise, for compensation, that it is a telegraph company within the terms and meaning of the revised statutes of the United States relating to telegraphs and including section 5263 thereof, authorizing the construction by any telegraph company of telegraph lines over the public lands and along military and post roads, and also within the provisions of section 3964 of said Revised Statutes, making all railroads post roads; and that it is entitled to the uses, benefits, privileges, and immunities granted to telegraph companies by said United States statutes; that long prior hereto said plaintiff duly filed with the Postmaster-

General of the United States its written acceptance of the restrictions and obligations required by law, and that said plaintiff is now entitled to exercise the powers and privileges conferred by law upon it.

XIV.

That said railroad, and the right of way upon which it is constructed hereinbefore described, constitute a public highway and post road, that said railroad is being operated for general railroad purposes and for the purpose of carrying freight and passengers as a common carrier for hire, and for carrying the United States mails, subject to the laws of the United States and of the State of Oregon.

XV.

That the right of way upon which defendants are now operating their railroad and upon which plaintiff is seeking a right of way for its electric telegraph, together with many thousands of acres of valuable real property, was granted by the United States to the grantors of the defendant Oregon and California Railroad Company; that said grants were made subject to the provisions of the Statutes of the United States, and including the provisions of Section 5263, Revised Statutes of the United States, enacted July 24, 1866, authorizing the construction by any telegraph company of telegraph lines over the public lands and along military and post roads; that said grants were made not only for the use and benefit of the grantors of the defendants, but

also for the use and benefit of the public; that the use plaintiff intends to make of the right of way herein sought is largely for the use and benefit of the public and for public purposes, and is in no possible way or manner detrimental to defendant in the general use to which it is devoted.

XVI.

That plaintiff desires and intends to construct a line of electric telegraph upon and along the right of way of defendants from said City of Portland to said state line between the States of Oregon and California by way of Oregon City, Clackamas County; Salem, Marion County; Albany, Linn County; Eugene, Lane County; Roseburg, Douglas County; Grants Pass, Josephine County; and Gregory, Jackson County, a distance of Three hundred and sixty-six and sixty-one one-hundredths (366.61) miles, or thereabouts, the purpose and intention of the plaintiff herein being to construct its said electric telegraph line upon and along the right of way of said defendants as follows: By erecting its telegraph poles upon and along said right of way, beginning on said right of way at the point where said right of way crosses the south boundary line of said City of Portland, and on the side opposite the side now occupied by the poles and wires of the Western Union Telegraph Company, said poles to be erected thirty-five (35) feet from the center line between the rails of the main track of said railroad, and continuing at said distance where the width and conditions of said right of way

of said defendants will permit of going so far, or as otherwise agreed upon by said defendants and plaintiff, and not nearer than fifteen (15) feet in any event, and not nearer than fifteen (15) feet from the center line between the rails of all side tracks, switches, turn-outs, etc., will permit of going so far, to the said state line between the States of Oregon and California, a distance of about Three hundred and sixty-six and sixty-one one-hundredths (366.61) miles, or thereabouts.

XVII.

That the plaintiff will construct its line of poles and wires of the best material and upon the most improved method of construction with poles not less than twenty-five (25) feet in length, stuck not less than five (5) feet in the ground, to have thereon cross arms not less than eight (8) feet long, each cross arm to carry not less than six (6) wires, and such other cross arms and wires as the business of the Company may from time to time, require it to place upon said poles, that said poles will not be less than eight (8) inches in diameter at the small end, and not less than fifteen (15) inches in diameter at the base or large end, that said poles will be so placed in the ground as to be held firmly in position, and at all curves will be so guyed and braced as to resist the tension of the wires stretched thereon, that said poles will be placed in a single and continuous line following the curvature of said right of way of said defendants and will be erected a distance of One hundred and thirty (130) feet, more or less, apart.

XVIII.

That in all cases where it may be necessary to cross the tracks of said railroad with said line of electric telegraph, said poles will be of sufficient height and will be placed far enough apart so that all wires will be raised above other wires or other structures rightfully upon said right of way, and that at all crossings of said railroad tracks, said wires will be so strung as to be at least twenty-seven (27) feet above the tops of the rails of said railroad tracks.

XIX.

That the plaintiff will so set its poles as not to interfere with any ditch, drain, culvert, or other work or structure of said railroad, and that in the event it may be deemed necessary or convenient at any time by said defendants to change the location of the tracks, or to construct new tracks, or side tracks, or to construct new depots or other buildings, or change the location of those now or hereafter to be constructed by said defendants, where any of plaintiff's poles or wires are located upon defendants' right of way, the plaintiff hereby consents and agrees to remove its said poles and wires from said places or points so to be used to any other part of the defendants' right of way thereunto adjoining, which may be designated by the defendants upon due and reasonable notice in writing given to the plaintiff by said defendants setting forth the desired change, all said changes and relocations of its wires and poles to be made at the expense of the plaintiff.

XX.

That the plaintiff expressly agrees and consents that the defendants may take from that part of the right of way over which its wires may be strung, and on which its poles may be set, all the earth, gravel, stone, water, or other material of every and any kind or character that said defendants may need from time to time, and that in the event said right of way is cut down, or the grade thereof changed in any manner, that the plaintiff agrees to reset its poles and wires at its own expense, upon due and reasonable notice in writing given to the plaintiff by the defendants, setting forth the desired changes, so that said poles and wires will conform to such new grade.

XXI.

That the plaintiff expressly agrees and consents that it has no right to fence any of said right of way, nor in any manner to exclude the defendants therefrom.

XXII.

That the plaintiff expressly agrees and consents that it shall assume all the risks to its poles, wires, insulators, cross-arms, etc., incident thereto, and will hold the defendant free and harmless from any damages to any of plaintiff's property occasioned by the burning of grass or undergrowth upon said railroad right of way.

XXIII.

That the erection of plaintiff's said electric telegraph

line as hereinbefore set forth and asked will in no way or manner interfere with the use or occupation by the defendants of the said right of way, nor will it interfere with the operation of cars or trains along the main line, side tracks, switches, turn outs, turn tables, spurs, etc., of the said railroad.

XXIV.

That the plaintiff urgently desires to begin the construction and erection of its said line of electric telegraph as aforesaid at once.

WHEREFORE, plaintiff prays that an assessment be made by the jury empanelled in this cause of the damages which may be sustained by the defendants for the appropriation of said right of way for said electric telegraph upon and along the right of way of said defendants hereinbefore described and plaintiff hereby expressly agrees and consents that said damages amount to the sum of Twenty-one hundred dollars (\$2,100.00) and further agrees and consents that such jury assess such damages in said sum; that upon payment into Court of the damages so assessed by the jury this Court may give judgment appropriating said right of way for said line of electric telegraph unto this plaintiff, and that thereafter the same shall be the property of the plaintiff.

Frederick V. Holman,

Attorney for Plaintiff.

That thereafter such proceedings were had and taken

in said suit above mentioned wherein said Pacific Postal Telegraph-Cable Company was plaintiff and this defendant and its predecessors were defendants, that on the 5th day of October, 1908, the said defendant and its said predecessor in interest served and filed its duly verified answer to the said complaint above set out, which said answer, is in words and figures, as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT
OF OREGON.

PACIFIC POSTAL TELE-)
GRAPH -CABLE COMPA-)
NY, a corporation,)
Plaintiff.)

vs.)

OREGON AND CALIFORNIA)
RAILROAD COMPANY, a)
corporation, and SOUTHERN)
PACIFIC COMPANY, a cor-)
poration,)
Defendants.)

A N S W E R

Come now the defendants above named and for answer to the plaintiff's complaint, admit, allege and deny as follows:

Admit each and every allegation of paragraphs I, II, III, IV, V, VI, VII, VIII, XI, XII, XIV and XXIV.

Deny each and every allegation of paragraphs IX, X, XIII, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII.

And the defendants for a first further and separate answer and defense to the plaintiff's complaint allege the following facts, to wit:

I.

That the Oregon and California Railroad Company is the owner and in possession by its tenant, its co-defendant, Southern Pacific Company, of all that certain right of way in the State of Oregon which extends in a general southerly direction from the City of Portland, County of Multnomah, State of Oregon, through and across parts of the Counties of Multnomah, Clackamas, Marion, Linn, Lane, Douglas, Josephine and Jackson, in said State of Oregon, for a distance of 366.61 miles, more or less, to the state line between the states of Oregon and California; that said right of way is one hundred feet in width, more or less, and that upon said right of way is constructed a railroad owned by said Oregon and California Railroad Company, and now in the possession of the Southern Pacific Company, as its lessee, and engaged in the operation thereof as a common carrier for hire, consisting of a single track main line, the rails of which are par-

allel and about four feet eight and one-half inches apart, and switches, side tracks, spurs, turn-outs, turntables, water tanks, station houses, section houses, and other railroad buildings, cuts, fills, bridges, trestles, and grades, and that said main line of railroad is located at or near the center line of said right of way aforesaid and that said right of way extends fifty feet, more or less, on each side of the center line of the main track of said railroad, throughout its entire length from said City of Portland to said state line, and that a portion of said right of way was granted to the predecessor in interest of the Oregon and California Railroad Company by act of Congress of July 25th, 1866, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," and that a portion of said right of way has been acquired by the predecessor in interest of said Oregon and California Railroad Company, by deeds of conveyance from private parties, and by condemnation proceedings, and a portion of said right of way has been acquired by the Oregon and California Railroad Company from deeds from private parties, and by condemnation proceedings under the laws of the State of Oregon; and that the Oregon and California Railroad Company and Southern Pacific Company, lessee, have ever since been and now are and each thereof is operating and maintaining said railroad and operating and maintaining a railroad and telegraph line over and along and upon said right of way, subject to the terms and provisions of said act of Congress, and that

heretofore and on or about October 9th, 1901, the Southern Pacific Company being then and there in possession of said railroad right of way and telegraph line under a valid lease executed by the Oregon and California Railroad Company to said Southern Pacific Company then and now in effect, and which said lease will expire on or about August 1, 1927, executed an agreement in writing with the Western Union Telegraph Company which was then and there a corporation duly organized and existing under the laws of the State of New York, having an office and place of business at Portland, Oregon, and elsewhere in the State of Oregon, and duly authorized to transact business in said state, whereby and pursuant thereto said Western Union Telegraph Company has constructed and ever since has been and is now operating over and upon said right of way and railroad track an electric telegraph line fully equipped for the transaction of business for the public, and that ever since said date the said Western Union Telegraph Company has been and now is engaged in the business of transmitting by wire despatches, messages, news and information, and the receipt and delivery thereof by means of carriers, United States mail, or otherwise, for compensation, under and pursuant to the laws of the United States and of the State of Oregon.

That the location, operation and maintenance of said telegraph line of the said Oregon and California Railroad Company and Southern Pacific Company, lessee, and the said location, maintenance and operation of the said

telegraph line of the Western Union Telegraph Company upon said right of way, and the location and operation of the tracks, sidings, switches, turnouts and depots, stations, station buildings, oil tanks, water tanks, and other necessary improvements and other necessary appurtenances used by the Oregon and California Railroad Company and Southern Pacific Company, lessee, in the operation and maintenance of its said line of railroad, will and do occupy substantially all and every part of said right of way for said purposes as aforesaid, and that the appropriation of any part of said right of way so sought by the plaintiff herein to its use for an electric telegraph line, would materially and substantially interfere with the use, operation and enjoyment of the said right of way for railroad purposes, and for the use of the said defendants, their successors and assigns, for a telegraph line or lines, and would in fact deprive the said defendants, their successors and assigns, or the reasonable, efficient and safe use of said right of way for railroad and other public purposes, as required by said Act of Congress, and as required by law.

II.

That the location and operation of the telegraph line and poles and other necessary appliances proposed by plaintiff herein upon said right of way or any part thereof, will materially and substantially interfere with the safe or convenient use or operation of the line of railroad and telegraph line of the said defendants, their successors or assigns, upon said right of way, and will ma-

terially interfere with the said defendants, their successors and assigns, in the performance of their public functions under said Act of Congress and the laws of the State of Oregon, and the appropriation proposed by plaintiff, and the operation of its electric telegraph line, and the maintenance of its poles and appliances on said right of way will cause the defendants, their successors and assigns, great and irreparable damage in the use of said right of way, railroad and telegraph line thereon for public purposes.

That the said right of way so owned by the Oregon and California Railroad Company and so in the possession of the Southern Pacific Company, its co-defendant herein, and the whole thereof, is necessary for the safe, convenient and efficient operation of the railroad of the said defendants now situated thereon, and that the future operation of said railroad and telegraph line thereon will, in the interest of the public service and in the interest of the said defendants, their successors and assigns, require an additional main track between Portland and the state line between Oregon and California, and will require numerous additional sidings, switches, turn-outs, and further and additional appliances reasonably necessary in the operation of said railroad to enable the said defendants, their successors and assigns to serve the public as common carriers for hire, and that by reason of the premises the plaintiff ought not to be allowed to condemn or appropriate any part of said right of way to its use for the location and operation of an electric tele-

graph line, as sought in this action.

And the defendants for a second further and separate answer and defense to the plaintiff's complaint, expressly reserving their right to defend this action in bar thereto, as set out in the first further and separate defense herein, allege the following facts, to wit:

I.

That the Oregon and California Railroad Company is the owner and in possession by its tenant, its co-defendant, Southern Pacific Company, of all that certain right of way in the State of Oregon which extends in a general southerly direction from the City of Portland, County of Multnomah, State of Oregon, through and across parts of the counties of Multnomah, Clackamas, Marion, Linn, Lane, Douglas, Josephine and Jackson, in the said State of Oregon, for a distance of 366.61 miles, more or less, to the state line between the States of Oregon and California; that said right of way is one hundred feet in width, more or less, and that upon said right of way is constructed a railroad owned by said Oregon and California Railroad Company, and now in the possession of the Southern Pacific Company as its lessee, and engaged in the operation thereof as a common carrier for hire, consisting of a single track main line, the rails of which are parallel and about four feet eight and one-half inches apart, and switches, side tracks, spurs, turnouts, turn-tables, water tanks, station houses, section houses and other railroad buildings, cuts, fills,

bridges, trestles, and grades, and that said main line of railroad is located at or near the center line of said right of way aforesaid, and that said right of way extends fifty feet, more or less, on each side of the center line of the main track of said railroad, throughout its entire length from said City of Portland to said state line, and that a portion of said right of way was granted to the predecessor in interest of the Oregon and California Railroad Company by an act of Congress of July 25th, 1866, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland, in Oregon," and that a portion of said right of way has been acquired by the predecessor in interest of said Oregon and California Railroad Company by deeds of conveyance from private parties, and by condemnation proceedings, and a portion of said right of way has been acquired by the Oregon and California Railroad Company by deeds of private parties, and by condemnation proceedings under the laws of the State of Oregon; and that the Oregon and California Railroad Company and Southern Pacific Company, lessee, have ever since been and now are and each thereof is operating and maintaining a railroad and telegraph line over and along and upon said right of way, subject to the terms and provisions of said act of Congress, and that heretofore and on or about October 9th, 1901, the Southern Pacific Company, being then and there in possession of said railroad right of way and telegraph line under a valid lease executed by the Oregon and California Railroad Company to said Southern

Pacific Company, then and now in effect, and which said lease will expire on or about August 1, 1927, executed an agreement in writing with the Western Union Telegraph Company which was then and there a corporation duly organized and existing under the laws of the State of New York, having an office and place of business at Portland and elsewhere in the State of Oregon, and duly authorized to transact business in said state, whereby and pursuant thereto said Western Union Telegraph Company has constructed and ever since has been and is now operating over and upon said right of way and railroad track an electric telegraph line fully equipped for the transaction of business for the public, and that ever since said date the said Western Union Telegraph Company has been and now is engaged in the business of transmitting by wire despatches, messages, news and information, and the receipt and delivery thereof by means of carriers, United States mail, or otherwise, for compensation, under and pursuant to the laws of the United States and of the State of Oregon.

That the location, operation and maintenance of said telegraph line of the said Oregon and California Railroad Company and Southern Pacific Company, lessee, and the said location, maintenance and operation of the said telegraph line of the Western Union Telegraph Company upon the said right of way, and the location and operation of the tracks, sidings, switches, turnouts, and depots, stations, station buildings, oil tanks, water tanks and other necessary improvements and appurtenances used by the Oregon and California Railroad Com-

pany and Southern Pacific Company, lessee, in the operation and maintenance of its said line of railroad, will and do occupy substantially all and every part of said right of way for said purposes as aforesaid, and that the appropriation of any part of said right of way so sought by the plaintiff herein to its use for an electric telegraph line, would materially and substantially interfere with the use, operation and enjoyment of the said right of way for railroad purposes, and for the use of the said defendants, their successors and assigns, for a telegraph line or lines, and would in fact deprive the said defendants, their successors and assigns, of the reasonable, efficient and safe use of said right of way for railroad and other public purposes as required by said Act of Congress, and as required by law.

II.

That the location and operation of the telegraph line and poles and other necessary appliances proposed by plaintiff herein upon said right of way or any part thereof, will materially and substantially interfere with the safe or convenient use or operation of the line of railroad and telegraph line of the said defendants, their successors or assigns, upon said right of way and will materially interfere with the said defendants, their successors and assigns, in the performance of their public functions under said Act of Congress and the laws of the State of Oregon, and the appropriation proposed by plaintiff, and the operation of its electric telegraph line, and the maintenance of its poles and appliances on said right

of way will cause the defendants, their successors and assigns, great and irreparable damage in the use of said right of way, railroad and telegraph line thereon for public purposes.

That the said right of way so owned by the Oregon and California Railroad Company and so in the possession of the Southern Pacific Company, its co-defendant herein, and the whole thereof, is necessary for the safe, convenient and efficient operation of the railroad of the said defendants now situated thereon, and that the future operation of said railroad and telegraph line thereon will, in the interest of the public service and in the interest of the said defendants, their successors and assigns require an additional main track between Portland and the state line between Oregon and California, and will require numerous additional sidings, switches, turn-outs, and further and additional appliances reasonably necessary in the operation of said railroad to enable the said defendants, their successors and assigns, to serve the public as common carriers for hire, and that by reason of the premises the plaintiff ought not to be allowed to condemn or appropriate any part of said right of way to its use for the location and operation of an electric telegraph line as sought in this action.

III.

That the whole of said right of way owned by the Oregon and California Railroad Company and in the possession of the said Southern Pacific Company, lessee,

co-defendant herein, has, at great expense to the said defendants, their predecessors in interest, been reasonably well adapted and has been so adapted by the expenditure of large sums of money, to the use of the said defendants for railroad and telegraph purposes, and particularly to the location and operation of a single track main line, and for necessary double tracks, main line, switches, side tracks, spurs, turnouts, turn tables, water tanks, station houses, section houses and other buildings, and the said defendants and their predecessors in interest have, at great expense, cleared the greater portion of said right of way, and removed timber, stumps, and other obstructions therefrom, and have caused the greater portion thereof to be fenced and enclosed, and that the proposed appropriation of the said right of way or any part thereof by the plaintiff for its electric telegraph line and poles and other necessary appliances will materially and substantially interfere with the use and operation of said railroad and telegraph line of the said defendants, their successors and assigns, and will materially increase the hazards and dangers to the employees of the said defendants, their servants and agents engaged in operating said railroad and telegraph line, and will endanger and increase the hazards to the shippers and other patrons of the said defendants in the use and operation of said railroad, and will thereby and by reason of the appropriation of any portion of said right of way, and particularly that portion of said right of way as sought to be appropriated by plaintiff, damage the said defendants in the sum of not less than Two

hundred fifty thousand (\$250,000.00) dollars, and that the reasonable value of the easement and right of way sought to be appropriated by the plaintiff and belonging to said defendants exceeds the sum of \$250,000.00.

WHEREFORE, defendants demand that the truth of their plea in bar, as set up in the first further and separate answer herein, be determined, and that if said plea be found true, that the plaintiff's action be dismissed; but that if the said plea should be overruled and not found true upon the trial of said cause, that the plaintiff be required to pay defendants the sum of Two hundred fifty thousand (\$250,000.00) dollars before any judgment condemning and appropriating said easement and right of way to plaintiff shall be rendered or entered, and that the defendants have judgment therefor and for their costs and disbursements herein.

Dolph, Mallory, Simon & Gearin,

Wm. D. Fenton and Ben. C. Dey,

Attorneys for Defendants.

That thereafter such proceedings were had and taken in said suit last above referred to, wherein the said Pacific Postal Telegraph-Cable Company was plaintiff and this defendant and its predecessor in interest were defendants, that on the 22nd day of October, 1908, the attorney for plaintiff in said suit and the attorneys for defendants therein made and filed the following stipulation in writing, which stipulation is in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT
OF OREGON.

PACIFIC POSTAL TELE-)
GRAPH-CABLE COMPA-)
NY, a corporation,)
Plaintiff,)

vs.)

OREGON AND CALIFOR-)
NIA RAILROAD COMPA-)
NY (a corporation), and)
SOUTHERN P A C I F I C)
COMPANY a corporation, as)
Lessee of the OREGON AND)
CAL I F O R N I A R A I L -)
ROAD,)
Defendants.)

STIPULATION.

It is hereby STIPULATED AND AGREED by and between William D. Fenton, of attorneys for defendants Oregon and California Railroad Company, and Southern Pacific Company, and Frederick V. Holman, of attorneys for plaintiff, Pacific Postal Telegraph-Cable Company, that each and every allegation contained in Paragraph IX of plaintiff's complaint in the above entitled Court and cause is true.

And it is further STIPULATED AND AGREED by and between plaintiff and defendants by their respective attorneys that the defendants admit each and every allegation in said Paragraph IX of said plaintiff's complaint contained.

Frederick V. Holman,
Of Attorney for Plaintiff,

Wm. D. Fenton,
Of Attorneys for Defendants.

Dated, Portland, Oregon, October 22nd, 1903.

That thereafter such proceedings were had and taken in said suit that on the 4th day of November, 1908, the said defendant in said suit served and filed its duly verified reply in writing, in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

Pacific Postal Telegraph-Cable Company,)
a corporation,)

Plaintiff,)
)

vs.
)

Oregon and California Railroad Company,) **REPLY**
a corporation, and Southern Pacific)
Company, a corporation, as lessee of the)
Oregon and California Railroad,)
Defendants.)

Comes now the plaintiff in the above entitled court and cause and replying to the first further and separate answer and defense of the defendants herein, admits, denies and alleges as follows:

I.

Plaintiff admits that the Oregon and California Railroad Company is the owner and in possession by its tenant, its co-defendant Southern Pacific Company, of all of that certain right of way in the State of Oregon which extends in a general southerly direction from the City of Portland, County of Multnomah, State of Oregon, through and across parts of the counties of Multnomah, Clackamas, Marion, Linn, Lane, Douglas, Josephine and Jackson, in said State of Oregon, for a distance of 366.61 miles, more or less, to the state line between the states of Oregon and California; that said right of way is one hundred feet in width, more or less, and that upon said right of way is constructed a railroad owned by said Oregon and California Railroad Company, and now in possession of the Southern Pacific Company as its lessee, and engaged in the operation thereof as a common carrier for hire, consisting of a single track main line, the rails of which are parallel and about four feet eight and one-half inches apart, and switches, side tracks, spurs, turn-outs, turn-tables, water tanks, station houses, section houses, and other railroad buildings, cuts, fills, bridges, trestles, and grades, and that said main line of railroad is located at or near the center line of said right of way aforesaid, and that said

right of way extends fifty feet, more or less, on each side of the center line of the main track of said railroad, throughout its entire length from said City of Portland to said state line, and that a portion of said right of way was granted to the predecessor in interest of the Oregon and California Railroad Company by Act of Congress of July 25, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon."

II.

Plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether a portion of said right of way has been acquired by the predecessor in interest of said Oregon and California Railroad Company by deeds of conveyance from private parties, or by condemnation proceedings, and plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether a portion of said right of way has been acquired by the Oregon and California Railroad Company from deeds from private parties, or by condemnation proceedings, under the laws of the State of Oregon, or under any laws, or by any condemnation proceedings.

III.

Plaintiff admits that the Oregon and California Railroad Company and Southern Pacific Company,

lessee, have ever since been and now are and each thereof is operating and maintaining said railroad and operating and maintaining a railroad over and along and upon said right of way, subject to the terms and provisions of said Act of Congress, but plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether the Oregon and California Railroad Company or Southern Pacific Company, lessee, or either thereof, ever since has been, or ever has been, or now is operating or maintaining a telegraph line over or along or upon said right of way, subject to the terms and provisions of said Act of Congress, or otherwise, or at all, except as is hereinafter set forth and alleged in this reply.

IV.

Plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether on or about October 9, 1901, or at any other time or date, the Southern Pacific Company being then or there in possession of said railroad right of way or alleged telegraph line, under a valid lease or other lease executed by the Oregon and California Railroad Company to said Southern Pacific Company then or now in effect, and which lease will expire on or about August 1, 1927, or at any time or date, executed an agreement in writing or other agreement with the Western Union Telegraph Company, whereby or pursuant thereto said Western Union Telegraph Company has constructed or ever since or at all has been or is now operating over or upon said right of way, or

any part thereof, or said railroad track, or any part thereof, an electric telegraph line fully equipped, or equipped at all, for the transaction of business for the public, or otherwise, or at all, or that ever since said date or at all the said Western Union Telegraph Company has been or now is engaged in the business of transmitting by wire, despatches, messages, news, or information, or the receipt or the delivery thereof by means of carriers United States mail, or otherwise, for compensation, or otherwise, under or pursuant to the laws of the United States, or the State of Oregon, or otherwise, or at all.

V.

Plaintiff admits that on or about October 9, 1901, the Southern Pacific Company was then and there in possession of said railroad right of way under a valid lease executed by the Oregon and California Railroad Company to said Southern Pacific Company then and now in effect, and which said lease will expire on or about August 1, 1927, and plaintiff admits that the Western Union Telegraph Company was then and there a corporation duly organized and existing under the laws of the State of New York, having an office and place of business at Portland, Oregon, and elsewhere in the State of Oregon, and duly authorized to transact business in said state, and plaintiff admits that said Western Union Telegraph Company has constructed and is now operating over and upon said right of way and railroad track an electric telegraph line fully

equipped for the transaction of business for the public, and that the said Western Union Telegraph Company has been and now is engaged in the business of transmitting by wire dispatches, messages, news and information, and the receipt and delivery thereof by means of carriers, United States mail, or otherwise, for compensation, under and pursuant to the laws of the United States and of the State of Oregon.

VI.

Plaintiff denies that the location, or operation or maintenance of the alleged telegraph line of the said Oregon and California Railroad Company or Southern Pacific Company, lessee, or the said location, maintenance, or operation of the said alleged telegraph line of the Western Union Telegraph Company upon said right of way, or any part thereof, or the location or operation of the tracks, sidings, switches, turnouts, or depots, stations, station buildings, oil tanks, water tanks, or any thereof or other necessary improvements or any improvements or other necessary appurtenances, or any appurtenances used by the Oregon and California Railroad Company or the Southern Pacific Company, lessee, or either of them, in the operation or maintenance of its or their said line of railroad, will or do occupy substantially, or occupy at all, all or every part of said right of way for said purposes as aforesaid, or any thereof, or any purposes, or that the appropriation of any part of said right of way so sought by the plaintiff herein to its use for an electric telegraph line, or any part thereof,

would materially or substantially interfere with or would interfere at all with the use, operation, or enjoyment of the said right of way, or any part thereof, for railroad purposes, or any purposes, or for the use of said defendants, their successors or assigns, or either, or any of them, for a telegraph line, or lines, or would in fact or would at all deprive the said defendants, their successors or assigns, or either or any of them, of the reasonable, efficient or safe, or any use of the said right of way, or any part thereof, for railroad or other public purposes, or any purposes, as required by said act of Congress, or as required by law, or as required otherwise, or at all.

VII.

Plaintiff denies that the location or operation of the telegraph line, or poles, or other necessary appliances, or any appliances proposed by plaintiff herein, or any part of such telegraph line, poles, or appliances, upon said right of way, or any part thereof, will materially or substantially interfere, or interfere at all, with the safe or convenient use or operation or any use or operation, of the line of railroad or alleged telegraph line of the said defendants, their successors or assigns, or either or any of them, upon said right of way, or any part thereof, or will materially interfere with or interfere at all with the said defendants, their successors or assigns, or either or any of them, in the performance of their public functions under said Act of Congress, or the laws of the State of Oregon, or with the performance of any other

function, public or private, or at all; and the plaintiff denies that the appropriation proposed by plaintiff, or the operation of its electric telegraph line, or the maintenance of its poles, or appliances, or of any electric telegraph line, poles, or appliances, on said right of way, or any part thereof, will cause the defendants, their successors or assigns, or either or any of them, great or irreparable damage, or any damage, in the use of said right of way, railroad, or telegraph line thereon, for public purposes, or any other purpose or purposes, or the use of any part of said right of way, railroad, or telegraph line, for public purposes, or any other purpose, or purposes, or will cause the defendants, their successors or assigns, or either or any of them any damage in excess of the sum of Twenty-one Hundred Dollars (\$2100.00).

VIII.

Plaintiff denies that the said right of way so owned by the Oregon & California Railroad Company, or so in the possession of the Southern Pacific Company, or the whole thereof, or that part of said right of way sought to be appropriated by plaintiff for its electric telegraph line, or any part thereof, is necessary for the safe, convenient, or efficient operation, or is necessary for any operation of the railroad of the said defendants now situated thereon.

IX.

Plaintiff denies that it has any knowledge or infor-

mation thereof sufficient to form a belief as to whether the future operation, or any operation, of said railroad, or any part thereof, or said telegraph line or any part thereof, thereon, will, in the interest of the public service, or in the interest of any service, or in the interest of the said defendants, their successors or assigns, or in the interest of either or any of them, require an additional main track or require any additional track between Portland and the state line between Oregon and California or between any other places on said right of way, or will require numerous additional sidings, switches, or turnouts, or will require any additional sidings, switches, or turnouts, or further or additional appliances, or any appliances, reasonably necessary or necessary at all, in the operation of said railroad, or otherwise, to enable the said defendants, their successors or assigns, or either or any of them to serve the public as common carriers for hire, or to serve the public otherwise, or at all.

X.

Plaintiff denies that by reason of the premises, or any part thereof, or otherwise, the plaintiff ought not to be allowed to condemn or appropriate any part of said right of way, or any part thereof, to its use for the location or operation of an electric telegraph line, as sought in this action.

And plaintiff replying to the second further and separate answer and defense of defendants herein

admits, denies and alleges as follows:

I.

Plaintiff admits that the Oregon and California Railroad Company is the owner and in possession by its tenant, its co-defendant, Southern Pacific Company, of all that certain right of way in the State of Oregon which extends in a general southerly direction from the City of Portland, County of Multnomah, State of Oregon, through and across parts of the counties of Multnomah, Clackamas, Marion, Linn, Lane, Douglas, Josephine and Jackson in said State of Oregon, for a distance of 366.61 miles more or less to the state line between the states of Oregon and California; that said right of way is one hundred feet in width, more or less, and that upon said right of way is constructed a railroad owned by said Oregon and California Railroad Company, and now in the possession of the Southern Pacific Company as its lessee, and engaged in the operation thereof as a common carrier for hire, consisting of a single track main line, the rails of which are parallel and about four feet eight and one-half inches apart, and switches, side tracks, spurs, turnouts, turn-tables, water tanks, station houses, section houses, and other railroad buildings, cuts, fills, bridges, trestles and grades, and that said main line of railroad is located at or near the center line of said right of way aforesaid, and that said right of way extends fifty feet more or less on each side of the center line of the main track of said railroad, throughout its entire length from said city of Port-

land to said state line, and that a portion of said right of way was granted to the predecessor in interest of the Oregon and California Railroad Company by Act of Congress of July 25, 1866, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon."

II.

Plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether a portion of said right of way has been acquired by the predecessor in interest of said Oregon and California Railroad Company by deeds of conveyance from private parties, or by condemnation proceedings, and plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether a portion of said right of way has been acquired by the Oregon and California Railroad Company by deeds of private parties, or by condemnation proceedings under the laws of the State of Oregon, or under any laws, or by any condemnation proceedings.

III.

Plaintiff admits that the Oregon and California Railroad Company and Southern Pacific Company, lessee, have ever since been and now are and each thereof is operating and maintaining a railroad over and along and upon said right of way, subject to the terms

and provisions of said Act of Congress, but plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether the Oregon and California Railroad Company or Southern Pacific Company, lessee, or either thereof, ever since has been, or ever has been, or is now operating or maintaining a telegraph line over or along or upon said right of way, subject to the terms and provisions of said Act of Congress, or otherwise, or at all, except as is hereinafter set forth and alleged in this reply.

IV.

Plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether on or about October 9, 1901, or at any other time or date the Southern Pacific Company, being then or there in possession of said railroad right of way or alleged telegraph line, under a valid lease or other lease executed by the Oregon and California Railroad Company to said Southern Pacific Company then or now in effect, and which lease will expire on or about August 1, 1927, or at any time or date, executed an agreement in writing or other agreement with the Western Union Telegraph Company, whereby or pursuant thereto said Western Union Telegraph Company has constructed or ever since or at all has been or is now operating over or upon said right of way, or any part thereof, or said railroad track, or any part thereof, an electric telegraph line fully equipped, or equipped at

all, for the transaction of business for the public, or otherwise, or at all, or that ever since said date, or at all, the said Western Union Telegraph Company has been or now is engaged in the business of transmitting by wire, despatches, messages, news, or information, or the receipt or the delivery thereof by means of carriers, United States mails or otherwise, for compensation, or otherwise, under or pursuant to the laws of the United States, or the State of Oregon, or otherwise, or at all.

V.

Plaintiff admits that on or about October 9, 1901, the Southern Pacific Company was then and there in possession of said railroad right of way under a valid lease executed by the Oregon and California Railroad Company to said Southern Pacific Company then and now in effect, and which said lease will expire on or about August 1, 1927, and plaintiff admits that the Western Union Telegraph Company was then and there a corporation organized and existing under the laws of the State of New York, having an office and place of business at Portland, and elsewhere in the State of Oregon, and duly authorized to transact business in said state, and plaintiff admits that said Western Union Telegraph Company has constructed and is now operating over and upon said right of way and railroad track an electric telegraph line fully equipped for the transaction of business for the public, and that the said Western Union Telegraph Company has been and now is engaged in the business of transmitting by

wire despatches, messages, news, and information, and the receipt and delivery thereof by means of carriers, United States mail, or otherwise, for compensation, under and pursuant to the laws of the United States and of the State of Oregon.

VI.

Plaintiff denies that the location, or operation or maintenance of the alleged telegraph line of the said Oregon and California Railroad Company or Southern Pacific Company, lessee, or the said location, maintenance, or operation of the said alleged telegraph line of the Western Union Telegraph Company upon said right of way, or any part thereof, or the location or operation of the tracks, sidings, switches, turnouts, or depots, stations, station buildings, oil tanks, water tanks, or any thereof, or other necessary improvements or any improvements or other necessary appurtenances, or any appurtenances, used by the Oregon and California Railroad Company or the Southern Pacific Company, lessee, or either of them, in the operation or maintenance of its or their said line of railroad, will or do occupy substantially, or occupy at all, all or every part of said right of way for said purposes as aforesaid, or any thereof, or any purposes, or that the appropriation of any part of said right of way so sought by the plaintiff herein to its use for an electric telegraph line, or any part thereof, would materially or substantially interfere with or would interfere at all with the use, operation, or enjoyment of the said right of way, or any part

thereof for railroad purposes, or any purposes, or for the use of the said defendants, their successors or assigns, or either, or any of them, for a telegraph line, or lines, or would in fact or would at all deprive the said defendants, their successors or assigns, or either or any of them, of the reasonable, efficient or safe, or any use of the said right of way, or any part thereof, for railroad or other public purposes, or any purposes, as required by said Act of Congress, or as required by law, or as required otherwise, or at all.

VII.

Plaintiff denies that the location or operation of the telegraph line, or poles, or other necessary appliances, or any appliances, proposed by plaintiff herein, or any part of such telegraph line, poles, or appliances, upon said right of way, or any part thereof, will materially or substantially interfere, or interfere at all, with the safe or convenient use or operation, or any use or operation, of the line of railroad or alleged telegraph line of the said defendants, their successors or assigns, or either or any of them, upon said right of way, or any part thereof, or will materially interfere with or interfere at all with the said defendants, their successors or assigns, or either or any of them in the performance of their public functions under said Act of Congress, or the laws of the State of Oregon, or with the performance of any other functions, public or private, or at all; and the plaintiff denies that the appropriation proposed by plaintiff, or the operation of its electric telegraph line, or the main-

tenance of its poles, or appliances, or of any electric telegraph line, poles, or appliances, on said right of way, or any part thereof, will cause the defendants, their successors or assigns, or either or any of them, great or irreparable damage, or any damage, in the use of said right of way, railroad, or telegraph line thereon, for public purposes, or any other purpose or purposes, or the use of any part of said right of way, railroad, or telegraph line, for public purposes, or any other purpose, or purposes, or will cause the defendants, their successors or assigns, or either or any of them any damage in excess of the sum of Twenty-one Hundred Dollars (\$2100.00).

VIII.

Plaintiff denies that the said right of way so owned by the Oregon and California Railroad Company, or so in the possession of the Southern Pacific Company, or the whole thereof, or that part of said right of way sought to be appropriated by plaintiff for its electric telegraph line, or any part thereof, is necessary for the safe, convenient or efficient operation, or is necessary for any operation of the railroad of the said defendants now situated thereon.

IX.

Plaintiff denies that it has any knowledge or information thereof sufficient to form a belief as to whether the future operation, or any operation, of said railroad, or any part thereof, or said telegraph line, or any part thereof, thereon, will, in the interest of the public service, or in the interest of any service, or in the interest of

the said defendants, their successors or assigns, or in the interest of either or any of them, require an additional main track or require any additional track between Portland and the state line between Oregon and California, or between any other places on said right of way, or will require numerous additional sidings, switches, or turnouts, or will require any additional sidings, switches, or turnouts, or further or additional appliances, or any appliances, reasonably necessary or necessary at all, in the operation of said railroad, or otherwise, to enable the said defendants, their successors or assigns, or either or any of them, to serve the public as common carriers for hire, or to serve the public otherwise, or at all.

X.

Plaintiff denies that by reason of the premises, or any part thereof, or otherwise, the plaintiff ought not to be allowed to condemn or appropriate any part of said right of way, or any part thereof, to its use for the location or operation of an electric telegraph line, as sought in this action.

XI.

Plaintiff denies that the whole of the right of way owned by the Oregon and California Railroad Company or in the possession of the said Southern Pacific Company, lessee, or any part thereof, sought by plaintiff to be appropriated to its use for an electric telegraph line has, at great expense to the said defendants, or their predecessors in interest, or either or any of them, or at any

expense to the said defendants, or their predecessors in interest, or either or any of them, been reasonably well adapted or adapted at all or adapted by the expenditure of large sums of money or by the expenditure of any sums of money or by the expenditure of any sums of money, or otherwise, or at all, to the use of purpose of the said defendants for railroad purposes or telegraph purposes, or for any other use or purpose whatsoever, and plaintiff denies that said right of way, or any part thereof, so sought by plaintiff to be appropriated to its use for an electric telegraph line has been adapted by the defendants, or their predecessors in interest, or either or any of them, at great expense, or any expense, or by the expenditure of large sums of money, or any sums of money, or otherwise, or at all, particularly, or at all, to the location or operation of a single track main line, or for necessary or other double tracks, main line, switches, side-tracks, spurs, turnouts, turntables, water tanks, station houses, section houses, or other railroad buildings, or for any other use or purpose whatsoever, and plaintiff denies that the defendants, or their predecessors in interest, or either or any of them, have expended large sums of money or any sums of money in any way, shape, or manner, on that part of said right of way sought by plaintiff to be appropriated to its use for an electric telegraph line.

XII.

Plaintiff denies that said defendants, or their predecessors in interest, or either or any of them, have, at

great expense, or at any expense, or otherwise, or at all, cleared or caused to be cleared or removed, or caused to be removed, timber, stumps, or other obstructions from that part of said right of way so sought by plaintiff to be appropriated to its use for an electric telegraph line, but plaintiff admits that said defendants have caused the greater portion of said right of way to be fenced and enclosed.

XIII.

Plaintiff denies that the proposed appropriation of that part of said right of way so sought by plaintiff to be appropriated to its use for the electric telegraph line of plaintiff, its poles or other necessary appliances, will materially or substantially interfere with or will interfere at all with the use or operation of said railroad, or said alleged telegraph line of the said defendants, their successors or assigns, or either or any of them, and plaintiff denies that the appropriation of that part of said right of way so sought by plaintiff to be appropriated to its use for an electric telegraph line will materially increase, or will increase at all the hazards or dangers to the employees of the said defendants, or either of them or to their or either of their, servants or agents engaged in operating said railroad or said alleged telegraph line, or other servants, or agents of said defendants, or either of them, and plaintiff denies that the appropriation of that part of said right of way so sought by plaintiff to be appropriated to its use for an electric telegraph line will endanger or increase the hazards to

the shippers or other patrons of said defendants, or either of them, or to any other person or persons whomsoever in the use or operation of said railroad, or otherwise, or at all, or will thereby, or by reason of the appropriation of any portion of said right of way by the plaintiff, or at all, or particularly that portion of said right of way as sought to be appropriated by plaintiff, damage the said defendants, or either of them, in the sum of not less than Two Hundred and Fifty Thousand Dollars (\$250,000) or will damage the said defendants, or either of them, in any sum in excess of the sum of Twenty-one Hundred Dollars (\$2100.00), and plaintiff denies that the reasonable value, or any value, of the easement or right of way sought to be appropriated by the plaintiff and belonging to said defendants, or either of them, exceeds the sum of Two Hundred and Fifty Thousand Dollars (\$250,000) or that the value thereof is in excess of the sum of Twenty-one Hundred Dollars (\$2100).

And for a further reply to defendants' first and second further and separate answers and defenses plaintiff alleges as follows, to-wit:

I.

That there is now located, constructed and maintained upon the right of way of said defendants between said City of Portland and said state line between Oregon and California, only one line of electric telegraph or other telegraph with its poles, cross-arms, wires,

insulators, and other necessary and convenient appurtenances; that the operation and maintenance of said line of electric telegraph is under the joint supervision and control of said defendants and the Western Union Telegraph Company; that there are strung upon the cross-arms of said electric telegraph line and the poles thereof a number of wires, a part of which said wires are under the exclusive supervision and control of the defendants and the remaining part of which said wires are under the exclusive supervision and control of the Western Union Telegraph Company; that there are no poles, wires, or telegraph apparatus located, operated or maintained upon said right of way of the defendants, excepting only the above described electric telegraph line with its poles, wires, cross-arms, apparatus, and appurtenances; that the wires so maintained and operated upon the said line of poles by the defendants constitute the only telegraph line of the said defendants upon, along or across said right of way and the wires so maintained and operated upon said line of the said Western Union Telegraph Company constitute the only telegraph line of the said Western Union Telegraph Company upon, along or across said right of way.

II.

That the location, construction, operation, and maintenance of the line of electric telegraph of plaintiff along, over and upon the said right of way of defendants will occupy a very small fractional part only of the

said right of way of defendants, to-wit, a circular foot of land more or less at regular intervals of one hundred and thirty (130) feet, in which said land will be dug holes five feet deep, more or less, and in which said holes will be placed the telegraph poles of plaintiff; that plaintiff will not attach its wires or fixtures of any kind to any of the bridges, trestles, buildings, or structures of the defendants and will not erect any of its poles upon any of the embankments of the defendants; that the occupancy by electric telegraph line of the plaintiff and the location, construction, operation and maintenance of said line by plaintiff on that part of the right of way of defendants sought by the plaintiff to be appropriated for its electric telegraph line will not interfere with the operation or maintenance by the defendants of their said railroad, nor will it interfere with the operation and maintenance by the defendants and the Western Union Telegraph Company of the said line of electric telegraph now operated and maintained by said defendant and said Western Union Telegraph Company, upon, along, and across said right of way, as has been herein set forth; that the location, operation and maintenance by plaintiff of its said line of electric telegraph upon that part of said right of way sought by plaintiff to be appropriated to its use for its electric telegraph line will not interfere with the user of the defendants, their successors or assigns of said right of way for railroad, telegraph or any other corporate purposes of said defendants, or their successors or assigns.

III.

That any changes in or addition to the electric telegraph line of the defendants and the Western Union Telegraph Company, or any changes in or addition to the said railroad, or its main line, switches, side-tracks, spurs, turn-outs, turntables, water tanks, station houses, section houses, or other appurtenances will not be interfered with by the electric telegraph line of the plaintiff by reason of the fact that the plaintiff promises and agrees to remove its poles, wires, fixtures, or appurtenances from any part of said right of way that may hereafter be needed by the defendants in the operation or maintenance of their said railroad or telegraph line, or their respective appurtenances, at the request of the defendants, their successors or assigns, and in accordance with the necessities of said defendants, their successors or assigns; that the present construction, operation and maintenance of the said railroad of the defendants and the said electric telegraph line of the defendants and the Western Union Telegraph Company will permit of the location, construction, operation and maintenance of plaintiff's line of electric telegraph with no interference to the defendants in their user thereof; that the proposed electric telegraph line of plaintiff will be located where physical conditions and the present user by the defendants of their right of way will permit, on the opposite side of said right of way from that now used for and occupied by the telegraph line of the Western Union Telegraph Company; that

such line of plaintiff can be constructed, should such construction for any reason be necessary, within a few feet of the telegraph line now located upon said right of way without contact with, injury to, or interference with said line or its appurtenances and without any interference with the operation, maintenance or user of said line by the defendants or the Western Union Telegraph Company, or of the said railroad or tracks of the defendants.

WHEREFORE, plaintiff prays that it may have judgment as prayed for in its complaint herein.

FRED V. HOLMAN,

ALFRED A. HAMPSON,

Attorneys for Plaintiff.

That thereafter such proceedings were had and taken in said suit that on January 7th, 1909, the attorney for plaintiff and the attorneys for defendants therein signed and filed a stipulation in words and figures as follows, to-wit:

the trial of the above named cause in the above named Court in proof of the fact that said Pacific Postal Telegraph-Cable Company duly and regularly adopted the resolution contained in said Exhibit A at the meeting of its Board of Directors held August 31, 1907, and that the said "Exhibit A" be admitted in evidence herein to prove original record as contained in the minutes of said meeting.

January 6, 1908.

FRED'K V. HOLMAN,
of Attorneys for Plaintiff.
WM. D. FENTON,
of Attorneys for Defendants.

“EXHIBIT A”

Extract from minutes of meeting of Directors of Pacific Postal Telegraph-Cable Company held
August 31st, 1907.

WHEREAS it has become necessary for this company in order to properly handle its business between the City of Portland, Oregon, and the boundary line between the states of Oregon and California to construct a new telegraph line between said points; and

WHEREAS it is essential for the interests of the Government and the public, as well as of this company that said line be constructed with the least possible delay; and

WHEREAS the most direct, safe and practicable post road for the construction of said telegraph line is upon and along the right of way of the Oregon and California Railroad from Portland, Oregon, to the boundary line between the states of Oregon and California,

THEREFORE BE IT RESOLVED, that the Pacific Postal Telegraph-Cable Company hereby selects the right of way of the Oregon and California Railroad from the City of Portland, Multnomah County, Oregon, to the boundary line between the states of Oregon and California, by way of Oregon City, Clackamas County, Salem, Marion County, Albany, Linn County, Eugene, Lane County, Roseburg,

Douglas County, Grants Pass, Josephine County and Gregory, Jackson County, a distance of 366.61 miles or thereabouts, as the most direct, safe and practicable post road for the construction, maintenance and operation of the new telegraph line of this company to consist of poles not less than twenty-five (25) feet long, sunk five (5) feet in the ground, to have thereon cross arms not less than eight (8) feet long, each cross-arm to carry not less than six (6) wires, and such other cross arms and wires as the business of the company may from time to time require it to place upon said poles and to maintain; and

FURTHER RESOLVED, that the officers of this company and Messrs. Lloyd and Wood of San Francisco, California, and Frederick V. Holman of Portland, Oregon, attorneys for the company, be and hereby are authorized and directed to negotiate with the said railroad for such right and privilege, and failing therein to proceed by proper legal proceedings in the name of this company to acquire the right of way for said telegraph line on the right of way of the Oregon and California Railroad from Portland, Oregon, to the boundary line between Oregon and California, and that the President and Treasurer be directed to pay such compensation therefor as may be finally adjudged and directed to be paid by this company in said proceedings; and

FURTHER RESOLVED, that the President or Vice President and Secretary of this company be and

they hereby are directed to make, sign and deliver to the said railroad company an offer for the purchase of said right of way and to proceed in the matter of agreeing upon a purchase and in the matter of condemnation, said offer to be substantially as follows:

To The Oregon & California Railroad Company,
Portland, Oregon.

You will please take notice that the undersigned **THE PACIFIC POSTAL TELEGRAPH-CABLE COMPANY**, a corporation duly organized and existing under the laws of the State of New York for the purpose of owning, constructing, using and maintaining lines of electric telegraph within and beyond the limits of the State of New York, and which has complied with the laws of the State of Oregon, and is authorized to transact therein the business for which it is incorporated.

Hereby notifies you that it is the purpose, desire and intention of the said undersigned Pacific Postal Telegraph-Cable Company to construct, maintain and operate a telegraph line, consisting of poles, cross arms, wires and appurtenances, along, across and over your right of way between the City of Portland in the State of Oregon, and the boundary line between the states of Oregon and California, a distance of 366.61 miles, or thereabouts; and

Now in order that you may be fully compensated for such appropriation and use of said right of way and

other property for the purpose aforesaid, the undersigned offers and will pay you therefor, and as such compensation, the sum of Two Thousand One Hundred Dollars (\$2,100), in lawful money of the United States, and the undersigned Pacific Postal Telegraph-Cable Company further requests your answer to the foregoing offer to be delivered to its attorney, Frederick V. Holman, at his office in the Chamber of Commerce Building, Portland, Oregon, within ten days from the date of the service of this offer upon you.

IN WITNESS WHEREOF the Pacific Postal Telegraph-Cable Company has caused its corporate name to be hereto subscribed by its Vice President, and to be attested by its Secretary, and the corporate seal to be hereto affixed at its office in the City of New York, State of New York, this day of 1907.

PACIFIC POSTAL TELEGRAPH-
CABLE COMPANY,

By

Vice President.

Attest:

Secretary.

A true copy,

J. O. Stevens, Secretary.

(Corporate Seal.)

That thereafter such proceedings were had and taken in said suit on January 11th, 1909, the attorney for plaintiff and the attorneys for defendants therein signed and filed a stipulation in words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

Pacific Postal Telegraph-Cable)
Company, a corporation,)
Plaintiff,)

vs.

)STIPULATION

Oregon and California Railroad)
Company and Southern Pacific)
Company,)
Defendants.)

IT IS HEREBY STIPULATED by and between the plaintiff and the defendants above named, by their respective attorneys, as follows:

I.

The Act of Congress approved July 25th, 1866, entitled, "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California, to Portland, in Oregon," as printed in Volume 14 of the United States Statutes at Large, on pages 239 and following, is the Act of Congress under which there was granted to the

Oregon Central Railroad Company, a corporation duly incorporated and organized on April 22nd, 1867, under and by virtue of the laws of the State of Oregon, and to its successor in interest, the Oregon and California Railroad Company, incorporated March 7th, 1870, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, a defendant herein, the lands, rights of way, privileges and franchises as set out in said Act, and that the Oregon Central Railroad Company and its successor, the Oregon and California Railroad Company, duly accepted, within the time required by said Act, all the terms and provisions thereof, and that the Oregon and California Railroad Company is the owner and in possession of the right of way granted by said Act of Congress, between Portland, Oregon, and the California state line; and the Southern Pacific Company, ever since on or about July 1, 1887, has been and now is in possession of said railroad right of way required to be constructed and maintained by said Act of Congress, and is so in possession and operating the same under a valid lease executed by the Oregon and California Railroad Company to said Southern Pacific Company, which will expire on or about August 1st, 1927.

II.

That the legislature of the State of Oregon, by its joint resolution adopted October 20th, 1868, duly designated the Oregon Central Railroad Company as the company entitled to receive the lands granted by said

Act of Congress of July 25th, 1866, and to receive the benefits and privileges conferred by said Act of Congress, and to assume its burdens and obligations, and that prior to the year 1869, said company duly became entitled to all the benefits, privileges and grants in the State of Oregon mentioned in or offered by the said Act of Congress.

III.

That the Act of Congress of July 25th, 1866, was amended by an Act of Congress of June 25th, 1869, entitled, "An Act to amend an Act entitled, ' An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' " as printed in Volume 15 of the United States Statutes at Large, on page 80; and the Act of Congress approved July 25th, 1866, was amended by an Act of Congress approved April 10th, 1869, entitled, "An Act to amend an Act entitled 'An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon,' " as printed in Volume 16 of the United States Statutes at Large, on page 47.

IV.

That on or about July 1st, 1869, the Oregon Central Railroad Company duly filed in the Department of the Interior its assent to the Act of Congress of July 25th, 1866, and prior to the month of October, 1869,

the said Oregon Central Railroad Company definitely fixed on the ground and surveyed the first section of the railroad in Oregon contemplated and provided for by said Act of Congress, which section of railroad extended from Portland to Jefferson, and comprised not less than sixty continuous miles of railroad from the northern terminus thereof; and on October 29th, 1869, said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior, on January 29th, 1870, duly accepted and approved, a map of the survey and definite location of the said first section of railroad, and that during the year 1869, and the months of January and February of 1870, said Oregon Central Railroad Company definitely fixed on the ground and surveyed the second section of railroad contemplated and provided for by said Act of Congress, which said second section of railroad extended from Jefferson to a point at or near Roseburg, and comprised not less than one hundred and twenty-four continuous miles of railroad from Jefferson; and on March 26th, 1870, the said company filed in the office of the Secretary of the Interior, and the Secretary of the Interior, on March 29th, 1870, duly accepted and approved a map of the survey and definite location of the said second section of said railroad; that on March 29th, 1870, the Oregon and California Railroad Company duly became the successor and assignee of the said Oregon Central Railroad Company, and the owner of and entitled to all the benefits, privileges and grants in the State of Oregon of the said Act of Congress of July 25th, 1866,

and amendments aforesaid, and thereby assumed the burdens and obligations contained in said Act of Congress, and the said Oregon and California Railroad Company has ever since so remained.

V.

That during the years 1868 and 1869, and prior to December 25th, 1869, the said Oregon Central Railroad Company constructed and fully equipped the first twenty miles of the railroad contemplated by and provided for in Act of Congress of July 25th, 1866, commencing at Portland; and during the years 1869 and 1870, and prior to September 1st, 1870, the said Oregon Central Railroad Company and the said Oregon and California Railroad Company constructed and fully equipped the second twenty miles of railroad contemplated by and provided for in said Act of Congress of July 25th, 1868, to a point distant forty miles from the commencement of said railroad at Portland; a portion of the said second twenty miles having been so constructed and equipped by the said Oregon Central Railroad Company prior to March 29th, 1870, and the remainder thereof by the defendant, Oregon and California Railroad Company, between March 29th, 1870, and September 1st, 1870. That the whole line of railroad contemplated and provided for by said Act of Congress of July 25th, 1866, commencing at the end of the second constructed twenty miles of railroad aforesaid, was constructed by the Oregon and California Railroad Company during the years 1870,

1871 and 1872; and that prior to December 4th, 1872, the said whole line of railroad from Portland to Roseburg was, and continuously since has been fully operated for the purposes contemplated by and provided for in said Act of Congress of July 25th, 1866; that commissioners were duly appointed by the President of the United States to examine said railroad as constructed from Portland to Roseburg, and such commissioners did duly examine all of said railroad, and thereafter duly reported to the President of the United States, under oath, that all of said railroad had been completed and equipped in all respects as required by the Act of Congress of July 25th, 1866, and that the same was ready for the service contemplated by the said act; and such reports were duly accepted and approved by the President of the United States, and that said reports were so made, accepted and approved on the following dates: The first twenty miles, commencing at Portland, report made on December 31st, 1869, accepted and approved on January 29th, 1870; the second twenty miles, report made October 5th, 1870, accepted and approved February 28th, 1871; the third and fourth twenty miles, report made on December 10th, 1870, accepted and approved on February 28th, 1871; the fifth twenty miles, report made on August 11th, 1871, accepted and approved on March 11th, 1872; the sixth twenty miles, report made on January 13th, 1872, accepted and approved March 11th, 1872; the seventh, eighth and ninth sections, including the last seventy-eight miles of the said railroad from Portland to Rose-

burg, report made on July 10th, 1878, accepted and approved July 11th, 1878.

VI.

That the remaining part of the railroad in Oregon contemplated and provided for in the Act of Congress of July 25th, 1866, extending from Roseburg to the southern boundary of the State of Oregon, was actually constructed, fully equipped, and made ready by the Oregon and California Railroad Company for the service contemplated by the said act, in several sections, during the years 1878 to 1889, inclusive, and all prior to the year 1890; and at various times prior to the last-mentioned date, commissioners, duly appointed by the President of the United States, examined the same as the several sections thereof were constructed, and duly reported, under oath, to the President of the United States, that the same had been completed and equipped in all respects as required by the said Act of Congress, and that the same was ready for the service contemplated by the said act; and at various times prior to the last-mentioned date, the President of the United States duly accepted and approved the said reports, and that ever since, and for some time prior to 1890, the Oregon and California Railroad Company, and the Southern Pacific Company as its lessee under said lease aforesaid, have maintained and operated said railroad from Portland to the southern boundary of the State of Oregon, as provided and required by said Act of Congress of July 25th, 1866, and that under said Act of Congress of July

25th, 1866, and as of the date thereof, the said Oregon & California Railroad Company, and its predecessor in interest, the Oregon Central Railroad Company, became the owners of the right of way granted by the United States, specified in said Act of Congress, through the public lands granted to said companies for the construction of said railroad and telegraph line, which said rights of way may be identified upon the trial of said cause by a blue print from the office of the engineer of the Southern Pacific Company identified and verified by a witness at the trial, and which said blue print may be offered in evidence upon the trial of said cause to show the location and extent of said right of way so granted by the United States, as aforesaid, without the production of the records, maps, plats and surveys on file in the office of the Secretary of the Interior, and without the production of a certified copy of the map of definite location, or of the said several reports hereinabove referred to, now on file in the office of the Secretary of the Interior.

And it is also further agreed that the said blue print and map, so to be identified by said engineer, shall show the right of way of the Oregon and California Railroad Company between Portland and the California state line, whether acquired by conveyance, by said Act of Congress, or by condemnation proceedings, and shall show the width and extent thereof, and that the said map when so identified, may be introduced in evidence without the production of the deeds for said rights of

way, or the judgments of condemnation, and shall be considered as good and sufficient evidence for the purpose of this cause, of the title of the Oregon and California Railroad Company to said rights of way and the whole thereof.

It is understood and agreed that the plaintiff may object to the introduction in evidence, upon the trial of said cause, of any fact admitted by this stipulation, upon the ground that said fact so admitted may be incompetent, immaterial and irrelevant, it being intended, however, to expressly waive the production of record evidence to prove said admitted fact, in order to save expense to the parties in this trial.

FRED'K V. HOLMAN,

Of Attorneys for Plaintiff.

DOLPH, MALLORY, SIMON
& GEARIN,

WM. D. FENTON,

Attorneys for Defendants.

Dated December 21st, 1908.

It is further stipulated that after defendant has identified and verified said blue print, plaintiff may offer the same in evidence to prove location, extent and description of the right of way of the Oregon & California Railroad Company, over which the plaintiff seeks to appropriate a right to construct its telegraph line, as sought in complaint.

Western Union Telegraph Co.

FRED'K V. HOLMAN,
Of Attorneys for Plaintiff.

BEN C. DEY,
R. MALLORY,
WM. D. FENTON,
Attorneys for Defendant.

That thereafter such proceedings were had and taken in said suit that the said defendants therein filed their cost bill in said suit; that thereafter such proceedings were had and taken in said suit that the plaintiff in said suit filed its objections to said cost bill; that thereafter and on the 2nd day of April , 1909, the said plaintiff in said suit, by and through its attorneys, filed its motion in said suit, in words and figures, as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES

FOR THE DISTRICT OF OREGON.

Pacific Postal Telegraph-Cable)
Company, a Corporation,)

Plaintiff,)

vs.)

Oregon and California Railroad)
Company, a Corporation, and)
Southern Pacific Company, a)
Corporation, lessee of the Ore-)
gon and California Railroad,)

Defendants.)

Comes now the plaintiff in the above entitled Court and cause, and shows to the Court:

That plaintiff does not desire or intend to construct its line of electric telegraph upon the railroad right of way of defendants between the City of Portland and

the state line between the States of Oregon and California, as prayed in the complaint herein.

That plaintiff does not desire or intend to avail itself of the verdict of the jury of the above entitled Court and cause, wherein it was found that plaintiff can construct its electric telegraph line along the right of way of the defendants without materially interfering with the user by said defendants of such right of way for railroad purposes, and assessing the damages of the defendants in the sum of \$66,600.00.

That plaintiff now desires and intends to discontinue and abandon this cause.

WHEREFORE, plaintiff moves that it may now be permitted to abandon and discontinue this case, and that the same may be dismissed, and that this Court enter judgment dismissing this cause.

FRED'K V. HOLMAN,

ALFRED A. HAMPSON,

Attorneys for Plaintiff.

That thereafter and on the 3rd day of April, 1909, there was entered and filed in said suit a judgment in writing, in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES

FOR THE DISTRICT OF OREGON.

Pacific Postal Telegraph-Cable)	
Company, a Corporation,)	
Plaintiff,)	
vs.	)	JUDGMENT
Oregon and California Railroad	)	OF
Company, a Corporation, and	)	DISMISSAL.
Southern Pacific Company, a)	
Corporation, lessee of the Ore-)	
gon and California Railroad,)	
Defendants.)	

Now at this time comes on regularly to be heard the motion of the above named plaintiff that it may be permitted to abandon and discontinue the above entitled case, and that the same be dismissed, and that this Court enter judgment dismissing this cause, the plaintiff appearing by Frederick V. Holman and Alfred A. Hampson, its attorneys, and the defendants appearing by William D. Fenton, of their attorneys.

After hearing the arguments of said attorneys, and the Court being now fully advised in the premises, it is

ORDERED that said motion be and the same is hereby ALLOWED, and that the above entitled cause be and the same is hereby dismissed, and that defendants recover their costs and disbursements in this cause against the plaintiff, taxed at \$ and that execution issue therefor.

CHAS. E. WOLVERTON,

Judge.

Dated, Portland, Oregon, April 3, 1909.

That thereafter and on the 29th day of July, 1909, a judgment was duly rendered and entered in the above entitled suit by the above entitled court in said suit, settling the costs therein, which said judgment is in words and figures as follows: Which said judgment was thereafter and on the day of, 1909, paid and satisfied, the said judgment which was so paid and satisfied being in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF THE UNITED
STATES
FOR THE DISTRICT OF OREGON.

Pacific Postal Telegraph-Cable)	
Company,	)	No. 3204
Plaintiff,)	
vs.	)	ORDER
Oregon and California Railroad	)	SETTLING
Company and Southern Pacific	)	COSTS.
Company,)	
Defendants.)	

Now at this time this cause comes on regularly to be heard on the bill of costs and disbursements heretofore filed herein by the defendants, and the plaintiff's objections to defendants' said bill heretofore filed by it, and the issues joined upon said pleadings, Frederick

V. Holman and Alfred A. Hampson appearing as attorneys for the plaintiff, and William D. Fenton and Ben C. Dey appearing as attorneys for defendants, and the Court being advised fully in the premises finds as follows, to wit:

That the item, "Jurors' meals (one-half) \$4.50" asked for by the defendants, and objected to by the plaintiff, is not a proper and necessary disbursement, and that said sum should not be allowed and taxes as a disbursement in this cause.

That the item, "Cost of preparing maps and blue prints showing location of right of way, track, poles, etc., \$4635.00," asked for by the defendants and objected to by the plaintiff, is not a proper and necessary disbursement, and that neither said sum nor any part thereof should be allowed and taxed as a disbursement in this cause.

That the item, "E. A. Klippel, 4 days and mileage, \$12.20," asked for by the defendants and objected to by the plaintiff, is not a proper and necessary disbursement, and that neither said sum nor any part thereof should be allowed and taxed as a disbursement in this cause.

That each and every of the items set forth in defendants' said bill of costs and disbursements, except the three items above mentioned, are due and taxable as such and are in all respects correct, necessary and proper, and should be allowed to said defendants and

taxed against said plaintiff as necessary and proper costs and disbursements of said defendants.

And the Court having duly made and filed with the Clerk of this Court a correct itemized statement of the costs and disbursements as allowed by the Court in the aggregate sum of three hundred eighty-one 20/100 dollars (\$381.20), now, therefore, it is hereby

ORDERED AND ADJUDGED, that the said item of "Jurors' meals (one-half) \$4.50," be totally disallowed.

And it is **FURTHER ORDERED AND ADJUDGED** that said item, "Cost of preparing maps and blue prints showing location of right of way, track, poles, etc., \$4635.00," be totally disallowed.

And it is **FURTHER ORDERED AND ADJUDGED** that the item, "E. A. Klippel, 4 days and mileage, \$12.20," be totally disallowed.

And it is **FURTHER ORDERED AND ADJUDGED** that the corrected bill of costs and disbursements as made and filed by the Court with the Clerk of the Court, in the sum of three hundred eighty-one 20/100 dollars (\$381.20) be and it hereby is in all respects allowed, and that defendants do have and recover of and from the said plaintiff the said sum of three hundred eighty-one 20/100 dollars (\$381.20) and that execution issue therefor.

Dated at Portland, Oregon, July 29th, 1909.

CHAS. E. WOLVERTON,
Judge.

II.

That thereafter such proceedings were had and taken in said suit that the same was brought on regularly for trial in the above entitled court before the judge thereof and the jury duly empaneled and sworn to try said cause; that thereafter such proceedings were had and taken in said suit that the plaintiff, the Pacific Postal Telegraph-Cable Company, introduced its evidence in support of its allegations in its complaint and rested; and thereupon the defendants in said suit, the defendant herein and its predecessor, introduced their evidence in support of its contention therein and in denial of the testimony offered by the said plaintiff, and in support of the allegations in their answer in said suit and rested; and thereupon, after all the evidence in said suit had been introduced, the same was argued to the court and the jury and the jury was thereupon duly instructed by the court as to the law governing said cause; that thereupon and on the 16th day of January, 1909, the said cause was submitted to the jury, duly empaneled therein for its verdict therein; that thereafter, the jury in said case having duly deliberated upon its verdict therein, rendered and filed in said court its verdict in said cause in writing, which verdict was in words and figures as follows, to wit:

IN THE CIRCUIT COURT OF UNITED
STATES FOR THE DISTRICT OF
OREGON.

Pacific Postal Telegraph-Cable)	
Company (a Corporation),)	
Plaintiff,)	
vs.	)	VERDICT.
Oregon and California Railroad)	
Company (a Corporation), and)	
Southern Pacific Company (a)	
Corporation), as Lessee of the)	
Oregon and California Railroad,)	
Defendants.)	

We, the jury empaneled to try the above entitled cause and to assess the damages which the defendants will sustain by reason of the appropriation by the plaintiff of the right of way described in the complaint, having heard the evidence in the above entitled cause, and determined upon the compensation and damages that it is just for the plaintiff to pay the defendants:

Find that the electric telegraph line of the plaintiff, as described in the complaint herein, can be constructed upon and along the right of way of defendants, Oregon and California Railroad Company and Southern Pacific Company by erecting telegraph poles twenty-five (25) feet in length, sunk not less than five (5) feet in the ground, to have thereon cross-arms not

less than eight (8) feet long, each cross-arm to carry not less than six (6) wires, said poles to be not less than eight (8) inches in diameter at the small end and not less than fifteen (15) inches in diameter at the base or large end; said poles to be erected at a distance of not less than fifteen (15) feet from the center line between the rails of the main track of said railroad and on the side of said right of way opposite the side now occupied by the poles and wires of the Western Union Telegraph Company, beginning at the south boundary line of the City of Portland, County of Multnomah, and State of Oregon, and extending southerly upon and along said right of way of the defendants through the counties of Clackamas, Marion, Linn, Lane, Douglas, Josephine and Jackson, in the State of Oregon, to the state line between the states of Oregon and California, a distance of three hundred and sixty-six and sixty-one one-hundredths (366.61) miles, more or less, without materially impairing or interfering with, or without being inconsistent with the user of said right of way by defendants and without being detrimental to the public.

And we further find that the just compensation to be made to the defendants, Oregon and California Railroad Company and Southern Pacific Company, for taking and damaging that part of their lands and right of way described in the complaint for a right of way for the construction and maintenance of the electric telegraph line of plaintiff is the sum of Sixty-six Thousand

Six Hundred Dollars (\$66,600.00.)

And we further find that the whole of that part of said right of way of defendants sought to be appropriated for its electric telegraph line by the plaintiff, as alleged in the complaint herein, is necessary for the right of way of plaintiff's said telegraph line as described therein.

And we further find that said sum of Sixty-six Thousand and Six Hundred Dollars (\$66,600.00) is the damage which will result to the defendants, and both of them, in their user of their right of way for railroad purposes, by reason of the construction by the plaintiff of its electric telegraph line, as alleged in the complaint herein, and is the damage of every kind and character, including the damage sustained by the defendants by reason of the appropriation of said part of their said right of way, and the damage of every kind and character which will result to said defendants, or either of them, from the appropriation of said part of said right of way and the construction, maintenance and operation by the plaintiff of its said electric telegraph line over and upon the said part of said right of way of defendants herein described, on and prior to the date of the filing of the complaint herein, to wit: on the twenty-fifth day of October, 1907.

DAVID L. POVEY,

Foreman.

And this defendant alleges that the questions of fact which were tried in the said last named suit were and are the same as in this suit and were answered in the verdict and decision in the said suit, and that all of the questions of fact made by the pleadings in said suit of the Pacific Postal Telegraph-Cable Company against this defendant and its said predecessor were and could have been litigated in the said suit; and this defendant alleges that all of the proceedings had and taken in the said suit of the Pacific Postal Telegraph-Cable Company against this defendant and its said predecessor were between the predecessor in interest of this plaintiff and this defendant and its predecessor, and the interests of the said plaintiff and the said defendants in the said former suit were the same as the interests of the said plaintiff and the said defendant in this suit; and the subject matter in the said former suit was and is the same as the subject matter in this suit.

And this defendant alleges that all of the facts and questions which were in issue in the said former suit as to the rights of the plaintiff and its said predecessor to use the said right of way of the said defendant were and are in issue in this suit, and all of said issues were passed upon by the court in the trial of said former suit and by the jury therein; and in the said former suit the said plaintiff and its said predecessor elected to bring an action to condemn a portion of the said right of way of the said defendants for the use of its said telegraph line, and the jury therein awarded to

the said defendants therein the sum of \$66,600, as a just compensation to be paid to the said defendants therein for the use of the said right of way by the said plaintiff and its said predecessor for its said telegraph line.

This defendant alleges that thereafter the said plaintiff and its said predecessor abandoned its right to pay the said compensation awarded by the said jury and use the said right of way for its said telegraph line, as hereinbefore alleged, and the said defendant alleges that the said plaintiff and the said Pacific Postal Telegraph-Cable Company are in truth and in fact one and the same company, the plaintiff being a subsidiary corporation of the said Pacific Postal Telegraph-Cable Company, and in truth and in fact the said plaintiff is prosecuting this suit for the benefit of the said Pacific Postal Telegraph-Cable Company as well as for itself, and this for the purpose of evading the payment of the said award of \$66,000 made by the jury in said former suit, and said plaintiff is now seeking to use the said right of way of the said defendant and appropriate a portion thereof without payment of any compensation whatever and the said defendant alleges that the said plaintiff as well as the said Pacific Postal Telegraph Company and each of them, are by the said former suit and the proceedings therein had and taken and the conduct of the said plaintiff and its said predecessor, concluded, estopped and barred of all right and ought to be concluded, estopped and barred from maintaining this suit.

WHEREFORE defendant demands judgment and decree of this court that the complaint of plaintiff herein be dismissed and that defendant have judgment against the said plaintiff that the said plaintiff and its said predecessor be forever barred, estopped and concluded from claiming any right to enter upon, construct or maintain a telegraph line upon the right of way of said defendant, and that defendant have judgment and decree for such other and further relief as the court shall deem equitable and just in the premises.

Wm. D. Fenton, James E. Fenton,
Ben C. Dey and K. L. Fenton,
Attorneys for Defendant.

(Endorsed) Answer.

Filed Oct. 16, 1911.

G. H. Marsh,
Clerk.

And afterwards, to wit, on the 18th day of December, 1911, there was duly filed in said Court, a Replication, in words and figures as follows, to wit:

(REPLICATION)

(Title)

The replication of the Postal Telegraph Company, a corporation, complainant, to the answer of the Southern Pacific Company, a corporation, defendant:

This replicant saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or things whatsoever in the said answer contained, material or affectual in the law to be replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable court shall direct, and humbly prays as in and by its bill it has already prayed.

O. W. Powers, Thos. Marioneaux,
Roger B. Sinnott, Loring K. Adams,
Solicitors for Complainant.

(Endorsed)

Replication filed Dec. 18, 1911,.

G. H. Marsh,
Clerk.

And afterwards, to wit, on the 7th day of August, 1912, there was duly filed in said court, an Order, in words and figures as follows, to wit:

(ORDER ALLOWING SUPPLEMENTAL
BILL TO BE FILED.)

(Title.)

Upon reading and filing the petition, duly verified, of the Postal Telegraph Company, praying that it be allowed to file a supplemental bill of complaint in the above entitled cause bringing in the Western Union Telegraph Company, a corporation, as defendant; and upon hearing Messrs. Sinnott & Adams, solicitors for complainant, and after due consideration,

IT IS ORDERED AND ADJUDGED, AND THE COURT DOTH ORDER AND ADJUDGE that the Postal Telegraph Company be, and it is hereby granted permission to file a supplemental bill in the above entitled cause against the Western Union Telegraph Company, and that a writ of Subpœna issue directed to the said Western Union Telegraph Company, commanding it to appear and answer at a certain date, and under a certain penalty, the said supplemental bill and abide by and perform such order and decree therein

as shall be agreeable to equity and good conscience.

R. S. Bean,

Judge.

(Endorsed)

Order filed Aug. 7, 1912,

A. M. Cannon,

Clerk U. S. Dist. Court.

And afterwards, to-wit, on the 7th day of August, 1912, there was duly filed in said court, a Supplemental Complaint, in words and figures as follows, to wit:

(SUPPLEMENTAL COMPLAINT.)

(Title.)

1. Humbly complaining, your orator sheweth unto your honor that your orator exhibited its original bill of complaint in this honorable court against the Southern Pacific Company, a corporation, as the defendant thereto, thereby stating that for many years your orator has maintained a telegraph line partly upon the right-of-way of the defendant, between the town of Eugene and the station of New Era in said state, and that your orator was proceeding to reconstruct the same on account of said telegraph line being in a decayed condition, and that the defendant forcibly interfered and stopped said reconstruction; and your orator showed unto your honor by said bill of complaint that your orator has a right to continue its said line on said railroad right-of-way and to reconstruct same; and your orator offered to pay to said defendant a reasonable sum for the right-of-way for said telegraph line on said railroad right-of-way in case this honorable court should decide that any such payment should be made by your orator; and your orator prayed that the defendant be enjoined from interfering with such reconstruction, or from interfering

with such telegraph line in any way as reconstructed, repaired or improved by your orator.

2. Your orator further showeth that the said defendant duly appeared and answered said bill, and thereupon your orator commenced taking testimony in accordance with the rules of this court, and the taking of said testimony has proceeded at various times, it having been adjourned from time to time by reason of facts hereinafter set forth.

3. Your orator further showeth that in addition to owning and maintaining a telegraph line as aforesaid between the town of Eugene and the station of New Era in said State of Oregon as set forth in your orator's original bill of complaint, that for more than twenty years your orator has owned and maintained a telegraph line along and upon the right of way of said defendant between the City of Portland and the town of Myrtle Creek and between said Myrtle Creek and the town of Ashland in said State of Oregon, all of which telegraph line and the right to maintain, enjoy and to reconstruct and repair the same was included in certain negotiations for the settlement of the differences between plaintiff and defendant hereinafter particularly referred to and set forth.

4. Your orator further showeth that negotiations for the adjustment of the differences between your orator and the defendant began soon after the commencement of the taking of testimony in this suit, and pro-

gressed favorably, and by reason thereof, the taking of said testimony was adjourned from time to time by reason of said negotiations and the prospect of a satisfactory adjustment of all the differences between your orator and the defendant being reached. That a draft of a proposed contract in settlement of the differences between your orator and the defendant involved in this suit was prepared by the defendant and submitted to your orator and your orator thereupon suggested some changes and returned said proposed contract to the defendant with said changes, and thereupon there were various conferences between the representatives of your orator and the defendant in regard thereto, and that finally the defendant on its understanding that the form of the said proposed contract was satisfactory to your orator, subject to a few comparatively small modifications which were not considered important enough to delay obtaining the approval of the Western Union Telegraph Company (hereinafter referred to) to the execution thereof by the defendant herein, requested of said Western Union Telegraph Company to consent to the defendant executing said proposed contract with your orator in adjustment of the matters involved in this suit; but said Western Union Telegraph Company has declined and refused to consent thereto and accordingly your orator files this supplemental bill.

Your orator alleges that attached hereto and made a part hereof and marked "Exhibit A" is a true copy of the said proposed contract of adjustment of the differ-

ences set forth in the bill of complaint in this suit, between your orator and the defendant, the changes and interlineations in red ink being disregarded.

Your orator further alleges that the changes and interlineations contained in said "Exhibit A" in red ink are small modifications which your orator has suggested to be made in said form of contract; and your orator alleges, upon information and belief, that the said changes are satisfactory to the defendant.

Your orator further alleges that the Western Union Telegraph Company is a corporation organized and existing under the laws of the State of New York for the purpose of carrying on a telegraph business throughout the United States.

Your orator further alleges that there is a contract existing between the Western Union Telegraph Company, a corporation, and the defendant herein, under and by the terms of which the said Western Union Telegraph Company claims the right to prevent the settlement of this action; and under said claim of right has in fact prevented the adjustment of the difficulties of the parties hereto; and your orator alleges that it is unable to set forth the terms of said contract; that it applied to the said Western Union Telegraph Company for a copy of the same, but has been unable to obtain a copy, and is therefore unable to state its terms and provisions;—but your orator alleges, upon information and belief, that the said contract, by its terms, gives

to the said Western Union Company a right to object to such a contract as your orator and the defendant herein have agreed upon; and your orator avers that the said contract is in violation of the Act of Congress of August 7th, 1888; that the said defendant is, as lessee of said railroad, subject to the said Act of Congress, said act being particularly applicable to the said defendant, as the predecessor in interest of the said defendant was what is known as a land grant railroad, as already set forth and alleged by your orator in its complaint.

Your orator further alleges that by reason of the provisions in said contract, the defendant herein requested the said Western Union Telegraph Company to consent to the execution by said defendant of the said proposed contract with your orator which is annexed hereto as "Exhibit A", the same being an adjustment of the differences involved in said suit, but that said Western Union Telegraph Company has refused to give said consent and has notified the defendant herein that it, the said Western Union Telegraph Company, will take over the defense of this suit and pay all the expenses incident thereto, and that the said Western Union Telegraph Company has so done and has appeared by its attorney and cross-examined the witnesses of plaintiff whose depositions were recently taken in this case.

Under the circumstances aforesaid, your orator is

desirous that said Western Union Telegraph Company be brought into this suit as a party defendant; that it show by what authority it claims the right to interfere with the settlement of the differences of the parties hereto, and that it set forth in its answer the contract existing between itself and the defendant and the predecessors in interest of the said defendant, and that the proposed contract attached hereto and marked "Exhibit A" modified by the changes and interlineations in red ink be adjudicated as a proper basis of decree to be entered herein.

Your orator accordingly prays as follows:

1. That a writ of subpœna of the United States of America be directed to the said Western Union Telegraph Company, commanding it at a certain date and under a certain penalty to appear before this honorable court and answer all and singular the premises, and abide by and perform such order or decree therein as shall be agreeable to equity and good conscience.

2. That the said Western Union Telegraph Company, a corporation, be ordered and required to discover and set forth any and what contract or contracts exists between itself and the Southern Pacific Company, a corporation, or the predecessors in interest of said Southern Pacific Company, by reason of which it claims the right to interfere in this suit to prevent the settlement of the same; and also that it discover and set forth by what right it interferes in this suit, and whether it

does so by the terms and provisions of any contract with the Southern Pacific Company, or its predecessors, and whether it claims that no other telegraph company than itself may construct or maintain its line of telegraph on the railroad right of way of defendant in the State of Oregon, without the consent of itself, and that it make a full and true disclosure and discovery of all the matters and things concerning its claim of right to interfere in this case, and to defend the same.

3. That your orator may have the relief prayed for in the original bill of equity filed herein.

4. That the said "Exhibit A" attached hereto, be made the basis of a decree to be entered herein adjudicating all the rights of the parties hereto.

Orlando W. Powers and Thos. Marioneaux,
and Rober B. Sinnott and Loring K. Adams,

Solicitors for Complainant.

“EXHIBIT A”

KNOW ALL MEN BY THESE PRESENTS.

That the Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, having an office and place of business and authorized to transact business in the State of Oregon and elsewhere, as party of the first part (hereinafter called the Southern Company), and the Postal Telegraph Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in said State of Oregon as party of the second part (hereinafter called the Postal Company), and the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in the State of Oregon, as party of the third part (hereinafter called the Oregon Company), have made and entered into the following agreement, to-wit:

FIRST. That the Southern Company and the Oregon Company, for and in consideration of the premises and the covenants and agreements hereinafter contained to be fulfilled and performed by the respective parties hereto, hereby grant unto the Postal Company the right to maintain and operate along and upon these certain lines of the right of way of the Oregon Com-

pany between Portland and Myrtle Creek in the State of Oregon hereinafter particularly described, 1694 telegraph poles with cross-arms and wires thereto attached, belonging to said Postal Company and now located upon said right of way; also the right to maintain and operate 3672 cross arms with telegraph wires thereon extending and suspended over those portions of the right of way of the Oregon Company hereinafter described, and attached to said telegraph poles of said Postal Company which are as now located adjacent to and without said right of way of the Oregon Company now leased to the Southern Company, together with the right to re-construct, or renew said poles and cross-arms in their present location, and to string wires thereon and to occupy said portions of said right of way for the purposes of the Postal Company, subject to the terms, conditions and provisions hereinafter contained.

SECOND: (1 The consideration therefor agreed to be paid by the Postal Company is at the rate of Ten Dollars per mile of said right of way where used or occupied by the Postal Company payable to the Southern Company on the execution and delivery of these presents and computed by the parties to be the sum of \$1,423.25.

(2 The Postal Company shall at once begin and proceed with the work of reconstruction of said poles and wires, and as the work progresses surveys shall be made showing the locations of the poles on said right of way and of poles adjacent to said right of way sup-

porting cross arms that overhang the right of way. The mileage of said right of way used or occupied by the Postal Company shall then be computed by the Postal Company by counting the said poles and dividing the number by 35. Said payment at the said rate on the mileage so computed is to be made by the Postal Company within thirty days after receipt of bills therefor based upon said surveys and rendered by the Southern Company.

THIRD. That upon payment of said sum hereinbefore stated by the Postal Company to the Southern Company. It is agreed by the parties hereto that the Postal Company has and shall have, and be let into the possession, operation and control of the said portion of said right of way for telegraph and telephone purposes and the reconstruction, maintenance and operation of its telegraph lines as now located over and along said right of way as hereinbefore described; that a particular description of the said telegraph line to be rebuilt and maintained by the said Postal Company over and along said right of way is as follows, to wit:

FOURTH: It is further covenanted and agreed by the Postal Company that the said telegraph line, when and as reconstructed, shall be so reconstructed as to consist of a single line of poles not less than twenty nor more than twenty-five feet in length, including length underground, planted firmly in the ground at a depth of not less than four feet. Said telegraph line

shall be reconstructed according to the most improved methods of construction. At highway crossings, or where obstructions exist, said poles shall be of such height as required by law, or by the physical condition existing at such places, or to protect other wires or structures rightfully upon said right of way. Said poles shall be set one hundred and fifty feet apart, making a total of thirty-five poles to the mile, excepting at sharp angles, where they may be set not less than seventy-five feet apart, and around curves, where they may be set one hundred and seventeen to one hundred and thirty-one feet apart, with cross arms at or near the top of said poles. Said cross arms shall not exceed ten feet in length and shall be fastened about the middle of the cross arms to the pole, upon which cross arms there shall be attached insulators, upon which cross arms shall be strung, from pole to pole, a sufficient number of wires to transmit speedily and properly all the business intrusted to the Postal Company for transmission by the United States Government and the public. The Postal Company is hereby given the right to replace its present cross-arms on said poles by cross-arms of any length, not to exceed ten feet, and to add to said cross-arms from time to time, but in no case are any cross arms to exceed ten feet in length.

FIFTH: The Postal Company further covenants and agrees that wherever it is now or hereafter becomes necessary to cross the railroad track of said railroad the said poles shall be of such height above the ground and

the wires strung so high as to prevent any interference with the operation and conduct of its business, and so as not to endanger the life or limb of its employees or other persons having occasion to be upon the said right of way. Each of said cross arms shall be constructed, maintained and operated subject to the terms and conditions contained in the usual form of wire crossing agreement then used by the Southern Company, which agreement shall be executed by both the Postal Company and the Southern Company without consideration other than the considerations of this agreement.

SIXTH: If at any time the Southern Company or the Oregon Company or either of them need any portion of said right of way where said poles and lines are strung, then, in such event, the Postal Company, upon reasonable notice, at its own expense shall remove the same to some other point or points upon said right of way that may be designated by the Southern Company and the Oregon Company, or either of them. And in the event that it shall become necessary in the operation and maintenance of the railroad system of the Southern Company or the Oregon Company, at any point between Portland, Oregon, and the Oregon and California State line, or any point mentioned herein, to use the entire right of way for railroad purposes, or to use any part thereof occupied by the Postal Company, then and that event, upon reasonable notice, the Postal Company shall at its own expense, remove its poles and wires from said right of way at the point

or points designated by the President of the Southern Company as necessary as aforesaid.

SEVENTH: It is further covenanted and agreed by the Postal Company that said Postal Company shall not attach or maintain wires or fixtures of any kind to any bridge, trestles, buildings or structures of the Southern Company or the Oregon Company or of the Western Union Telegraph Company, and shall not erect any of its poles upon any of the embankments of the Southern Company or the Oregon Company, and shall not place or maintain its poles nearer than five feet to the rim of cuts, and shall only occupy such portions of the said right of way of said railroad companies as are now except as provided in Par. Sixth and except that the number of cross-arms not exceeding ten feet in length may be increased at any time and from time to time, occupied by said Postal Company and as are not being used by the said Southern Company or the Oregon Company for railroad purposes, or such portions thereof as are not being used by the Western Union Telegraph Company.

EIGHTH: The Postal Company further covenants and agrees that its telegraph line shall be so constructed that it will not come in contact with or interfere with any telegraph line already constructed on the said right of way of the Southern Company and the Oregon Company, and it is further agreed that the Postal Company shall in all manner comply with the statutes of the State of Oregon in the reconstruction of its line

of telegraph aforesaid, and with any decree that may be entered in that certain suit now pending in the District Court of the United States for the District of Oregon, wherein the Postal Telegraph Company, a corporation, is plaintiff, and the Southern Pacific Company, a corporation, is defendant, and known in said Court as No. 3829.

NINTH: It is further agreed by and between the parties hereto that the Postal Company, upon the payment of the said sum agreed to be paid, may enter upon the right of way of the Southern Company and the Oregon Company as aforesaid, and reconstruct its telegraph lines as set forth herein, but that the poles of said Postal Company erected and maintained upon the right of way of the Southern Company and the Oregon Company shall not be placed and /or/ maintained within falling distance of any telegraph line now on said right of way, except that wherever by the topography of the country, highways, buildings or lack of width of the right of way, or the nearness of the existing telegraph lines to the easterly or westerly line of said right of way, the poles of the telegraph line of the Postal Company, by reason of the height or otherwise, shall be within such falling distance, then in that event, said poles of the Postal Company shall be guyed in accordance with improved methods of construction. It is hereby expressly agreed, everything to the contrary herein contained notwithstanding, that in the event the Postal Company shall remove any of its poles, cross arms or

wires from said right of way of the Oregon Company, that such removal shall constitute an abandonment by the Postal Company of any and all rights it may have acquired in and to such portion of said right of way from which said poles, cross-arms or wires were so removed.

TENTH: It is further understood and agreed by and between the parties hereto that this agreement shall be the basis of a decree in favor of the Postal Company in the above entitled case and against the Southern Company or the Oregon Company or the Western Union Telegraph Company if added as parties to said cause, but that the Postal Company shall take no decrees for costs or disbursements in said cause, and that upon the entry of said decree with a copy of this agreement therein, said Court may enter a decree in accordance with said agreement and subject to its terms and provisions, appropriating to the Postal Company so much of said right of way as in hereinbefore specifically described for its use as a telegraph company subject to the terms and provisions of this agreement, with the right of either party to this agreement to apply to said Court for the enforcement of said decree and this agreement.

ELEVENTH: This agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto

have caused this instrument to be executed in six parts
by their officers thereunto duly authorized, this.....
day of A. D. 1912.

Executed in the presence of us:—

As to the Southern
Pacific Company:

SOUTHERN PACIFIC
COMPANY

..... By
..... President.

and

.....
Secretary.

As to the Postal
Telegraph Company:

POSTAL TELE-
GRAPH COMPANY,

..... By
..... President.

and

.....
Secretary.

As to the Oregon and
California Railroad Co:

OREGON AND CALI-
FORNIARAILROAD
COMPANY,

..... By
..... President

and

.....
Secretary.

Western Union Telegraph Company hereby consents to the foregoing agreement this day of 1912.

WESTERN UNION TELEGRAPH COMPANY

By

(Endorsed)

Supplemental Complaint filed Aug. 7, 1912.

A. M. Cannon,

Clerk U. S. Dist. Court.

And afterwards, to wit, on the 10th day of September, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

(DEMURRER OF SOUTHERN PACIFIC CO.
TO SUPPLEMENTAL BILL.)

(Title.)

This defendant by protestation not confessing all or any of the matters or things in said Supplemental Complaint contained, to be true in such manner and form as the same are herein set forth and alleged, doth demur to said Supplemental Complaint. And for cause of Demurrer sheweth:

That it appeareth by the Complainant's own showing by said Supplemental Complaint that it said Complainant is not entitled to the relief prayed for by the said Supplemental Complaint, or for any relief against the Western Union Telegraph Company.

WHEREFORE, and for divers other good causes of demurrer appearing on the said Supplemental Bill, this Defendant doth demur thereto, and said Defendant prays the judgment of this Honorable Court whether it the said Western Union Telegraph Company shall be required to make any answer to said Supplemental

Complaint, and humbly prays to be hence dismissed with the reasonable costs in this behalf sustained.

Rufus Mallory and
Wm. D. Fenton
Counsel for Defendant.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

Wm. D. Fenton,
Of Counsel for Defendant,

(Endorsed)

Demurrer filed Sep. 10, 1912.

A. M. Cannon,
Clerk U. S. Dist. Court.

And afterwards, to wit, on the 4th day of October, 1912, there was duly filed in said Court, a Demurrer, in words and figures as follows, to wit:

(DEMURRER OF WESTERN UNION TELE-
GRAPH CO. TO SUPPLEMENTAL BILL.)

(Title.)

The Defendant Western Union Telegraph Company by protestation not confessing all or any of the matters or things in said Supplemental Complaint contained, to be true in such manner and form as the same are herein set forth and alleged, doth demur to said Supplemental Complaint, And for cause of Demurrer sheweth:

That it appeareth by the Complainant's own showing by said Supplemental Complaint that it said Complainant is not entitled to the relief prayed for by the said Supplemental Complaint, or for any relief against the Western Union Telegraph Company.

WHEREFORE, and for divers other good causes of demurrer appearing on the said Supplemental Bill, this Defendant doth demur thereto, and said Defendant prays the judgment of this Honorable Court whether it the said Western Union Telegraph Company shall be required to make any answer to said Supplemental Com-

plaint, and humbly prays to be hence dismissed with the reasonable costs in this behalf sustained.

Rufus Mallory,
Counsel for Defendant Western
Union Telegraph Company.

I hereby certify that the foregoing Demurrer is in my opinion well founded in point of law.

Rufus Mallory,
Of Counsel for Defendant Western
Union Telegraph Company.

(Endorsed)

Demurrer filed Oct. 4, 1912.

A. M. Cannon,
Clerk.

And afterwards, to wit, on Monday, the 25th day of October, 1912, the same being the 96th Judicial day of the regular July term of said Court; Present: the Honorable R. S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

(ORDER OVERRULING DEMURRER OF
WESTERN UNION TELEGRAPH CO.
TO SUPPLEMENTAL BILL.)

(Title.)

This cause heretofore submitted upon demurrer of Western Union Telegraph Company to supplemental bill of complaint, came on regularly at this time for the ruling and decision of the Court; whereupon after due consideration it is Ordered that said demurrer be and the same hereby is overruled and the defendant Western Union Telegraph Company have and hereby is granted thirty (30) days to answer.

And afterwards, to wit, on the 13th day of December, 1912, there was duly filed in said Court, an Answer in words and figures as follows, to wit:

(ANSWER OF WESTERN UNION TELE-
GRAPH COMPANY TO SUPPLE-
MENTAL BILL.)

(Title.)

The Defendant Western Union Telegraph Company, hereinafter for convenience called the Telegraph Company, now and at all times saving to itself all and all manner of benefit and advantages of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties and imperfections in Complainant's Supplemental Bill of Complaint (hereinafter called the Supplemental Bill) contained, for answer thereto, or to so much and such parts thereof as it is advised it is material or necessary for it to make answer to, answering says:

I.

Defendant admits that the Complainant exhibited its original Bill of Complaint in this Honorable Court against the Southern Pacific Company substantially as alleged in said Supplemental Bill, but this Defendant does not admit that the matters and things in said orig-

inal Bill stated and set forth are true, but denies any right of said Complainant Company in or to the use of the right of way of the Southern Pacific Company for the purposes of its telegraph line other than may have been acquired and used under a license for that purpose as is more fully and in detail stated and set forth in the Answer of the Southern Pacific Company to the original Bill filed in this cause which Answer so far as the same is applicable to this Defendant, is hereby adopted by this Defendant as a part of its Answer herein.

II.

Admit that the said Defendant Southern Pacific Company appeared and answered said Bill, that the taking of testimony was begun and such proceedings were had as in Paragraph II of said Bill set forth.

III.

Answering Paragraph III of said Supplemental Bill, this Defendant says it has not knowledge, information, remembrance or belief as to whether Complainant during the time in said Paragraph III set forth and stated, owned or maintained a telegraph line along or upon the right of way of the Southern Pacific Company, but Defendant avers and says that if the Complainant did in fact occupy said right of way and did maintain thereon telegraph lines, such occupancy and maintenance were in pursuance of license and permission granted by the

person in charge of said Railroad and vested with power to grant such license, and not otherwise.

IV.

Answering Paragraph IV of said Supplemental Bill, this Defendant avers and on information and belief says, that negotiations of the nature described in said Paragraph IV have taken place between the Complainant and the Southern Pacific Company, but as to the details of such negotiations this Defendant is without knowledge, understanding, remembrance or belief and therefor neither admits or denies the same.

But this Defendant admits that a form of agreement substantially as stated in the Supplemental Bill, but not executed by the Southern Pacific Company, was laid before this Defendant, with notice that in the event of Defendant's approving and executing, the same would also be executed by the Southern Pacific Company and the Complainant, and become operative and binding otherwise not.

That Defendant exercising its option declined to approve or execute the proposed agreement, and same has never been executed by the Southern Pacific Company and is without force or effect.

V.

Answering Paragraph V of said Supplemental Bill, Defendant avers and says it is informed and believes that

the writing designated by the Complainant in said Supplemental Bill as "Exhibit A" is a copy of the proposed agreement in said Supplemental Bill mentioned; but Defendant is without knowledge, information, remembrance or belief as to whether the changes and interlineations therein in red ink was or were to be disregarded, and this Defendant denies upon information and belief that said changes in said proposed agreement made by the Complainant as alleged in said Supplemental Bill were or are satisfactory to the said Southern Pacific Company.

VI.

Answering Paragraph VI of said Supplemental Bill this Defendant admits the Western Union Telegraph Company is a corporation as alleged and for the purposes alleged.

VII.

Answering Paragraph VII of said Supplemental Bill, this Defendant admits that there is a contract between the Southern Pacific Company and the Western Union Telegraph Company, this Defendant, by and through which this Defendant claims certain rights and privileges regarding the use of the right of way of the railway of the Southern Pacific Company in the Supplemental Bill set forth; but denies that this Defendant claims the right to prevent the settlement of this action except so far as any proposed settlement may injuriously effect any rights of this Defendant. That it claims the

right to object to or prevent such or any settlement as will or may involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and the Complainant, this Defendant claims no right to object, unless its approval of such proposed settlement is made a condition upon which the Southern Pacific Company undertakes to execute such agreement, in which case this Defendant claims that it may withhold its assent and thereby prevent the execution of said Agreement whether this Defendant has any interest in or is to be affected by such agreement or not.

This Defendant further avers and says that it is without knowledge, information, remembrance or belief as to whether Complainant is without knowledge of the terms of said agreement, but admits that Complainant applied to Defendant for a copy thereof, which Defendant declined to furnish.

Further answering Paragraph VII this Defendant says it is not true and it denies that it claims that said contracts invests the Telegraph Company with the right to object to such contract as described in Complainant's "Exhibit A", but on the contrary Defendant avers and says that it claims no right to object to any contract which the Complainant and the Southern Pacific Company may enter into so far as the same affects only the rights of the said Southern Pacific Company and does not affect the rights of the Telegraph Company. But

this Defendant claims, avers and says that whatever rights are conferred upon it by its said contract with the said Southern Pacific Company, or from other causes, are its own property and not subject in any manner to the control, use or disposition by the said Southern Pacific Company by contract with the Complainant, or otherwise, and denies the right, power and authority of this Court to compel it to execute the said agreement as evidenced by said "Exhibit A", or any agreement whatever.

Further answering Paragraph VII this Defendant says it is not true and it denies that said agreement between the Southern Pacific Company and this Defendant, hereinafter set forth, is in violation of the Act of Congress of August 7th, 1868, but Defendant admits that the lessor of the Defendant was what is known as a land grant railroad company and the rights claimed by it herein were conferred by the said lessor railroad company and its lessees, which rights are evidenced by the contract hereinafter referred to and set up.

VIII.

Answering Paragraph VIII of said Supplemental Bill, this Defendant says it is not true and it denies that the Southern Pacific Company requested the Telegraph Company to consent to the execution by said Southern Pacific Company of said proposed contract with the Complainant marked "Exhibit A", but Defendant avers

that said proposed agreement was laid before this Defendant by said Southern Pacific Company for its consideration, and if approved, to signify its approval by executing the same.

That this Defendant exercising its option in the premises, declined to approve said proposed agreement, and in pursuance of the terms of its said agreement with the Southern Pacific Company assumed and took over the defense of the said suit of the Postal Telegraph Company against the Southern Pacific Company, the original suit in which this Supplemental Bill is filed.

IX.

Further answering said Supplemental Bill this Defendant avers and says: That about the 1st day of April, 1871, The Oregon & California Railroad Company, a corporation, duly incorporated, organized and existing under the laws of the State of Oregon, was the owner of a right of way for a Railroad along and over the route and lines described in the Supplemental Bill from Portland, in the State of Oregon, to the Southern boundary of said State, which right of way was acquired by said Company by private purchase or public condemnation wherever said right of way passed or passes over private property, and for such portions of said right of way as passes or passed over public lands of the United States, said right of way was acquired by grant of an Act of Congress of the United States approved

July 25th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad in California to Portland in Oregon", upon terms and conditions in said Act expressed.

That said grant was upon conditions among other things set forth in Section 5 of said granting Act that said railroad Company shall keep the railroad and telegraph line required by said Act in repair and use and shall at all times transport the mails upon said railroad and transmit despatches by said telegraph line for the Government of the United States when required so to do by any department thereof, and the Government shall at all times have the preference in the use of said lines.

That prior to the 1st day of April, 1871, said Railroad Company accepted said grant, filed its assent thereto as required by said granting Act and thereby became the owner of said grant and right of way and began the construction of said railroad.

That on said 1st day of April, 1871, said Oregon and California Railroad Company entered into an agreement with this Defendant whereby in consideration among other things that this Defendant would construct, maintain and operate a telegraph line upon the right of way of said railroad between the City of Portland and the Southern boundary of the State of Oregon and would use the same itself or permit the use thereof for or by the

railroad company and the United States as might be required by either and as required by said Act of Congress making said grant, sold, transferred and made over to the Telegraph Company the right to enter upon and occupy and to construct, maintain and operate upon, along and over the said railroad right of way such telegraph line or lines as should be necessary for the business required by said railroad company. That the telegraph line so to be constructed, maintained and operated by the Telegraph Company was to be in lieu of and was to take the place and stand as the telegraph line required to be constructed, maintained and operated by the said Railroad Company by said Act of July 25th, 1866, the said railroad company thereby avoiding the necessity of expending the money required for the construction, maintenance and operation of said telegraph line.

That in pursuance of said agreement of April 1, 1871, said Telegraph Company immediately entered upon said right of way, constructed thereon the necessary telegraph lines, provided the same with the necessary machinery and appliances for the successful and proper transmission of messages by telegraph and has in all things complied with the terms of said agreement, and with the requirements of said Act of July 25, 1866, and from time to time as the business of said railroad and of the United States, has increased and expanded, the Telegraph Company has increased and improved its appliances so as at all times and in a proper manner to meet the requirements of said new condition and has

always promptly and properly met the same.

That prior to the 1st day of October, 1901, the Defendant Southern Pacific Company became and ever since has been and now is the lessee of the said Oregon and California Railroad and its rights of way and property of every kind, character and description, subject however to the rights of the Telegraph Company under its said contract of April 1, 1871, to the use of the right of way for telegraph purposes.

That on the 1st day of October, 1901, said Southern Pacific Company as such lessee, entered into the agreement heretofore referred to, attached hereto and marked "Exhibit B," under which agreement said Telegraph Company continued to hold possession of said right of way for telegraph purposes, performed all requirements, met all demands of said railroad and of the United States, and all requirements of the said Act of July 25, 1866, and expects to and intends to, and if permitted, will continue to perform the same during the remainder of the term of said agreement of October 1st, 1901.

This Defendant avers and says that it has the right to refuse its assets and to object to the execution of the alleged agreement between the Southern Pacific Company and the Complainant, not only as to itself, but it has the right to so object to the execution thereof by the Southern Pacific Company so far as such execution may injuriously affect, impair or destroy the, or any vested rights of this Defendant.

That said Agreement of October 1st, 1901, is as follows, to wit:

THIS AGREEMENT, made and entered into this ninth (9th) day of October, 1901, by and between the Western Union Telegraph Company, a Corporation organized and existing under the laws of the State of New York, party of the first part, (hereafter, for convenience, called the Telegraph Company), and the Southern Pacific Company, a Corporation organized and existing under the laws of the State of Kentucky, contracting in respect to the following Railroads, viz:

Southern Pacific Railroad (of California)

Southern Pacific Railroad (of Arizona)

Southern Pacific Railroad (of New Mexico)

Central Pacific Railway

New Mexico and Arizona Railroad

Carson and Colorado Railway

Oregon and California Railroad

Gila Valley, Globe and Northern Railway

which railroads are now leased, operated or controlled by it, and in respect of such lines of railroad west of El Paso, Texas, as, while this Agreement is in force, may hereafter be leased, operated or controlled by it, through ownership of stock, or otherwise (hereinafter, for convenience, called the Pacific Company).

WITNESSETH:

That Whereas, The Pacific Company controls, or holds under lease and operates, certain railroads along which there are certain telegraph lines owned by the Railroad Companies owning such Railroads as shown by Exhibit A, hereto annexed, and certain other telegraph lines owned by the Telegraph Company as shown by Schedule B, hereto annexed; and

Whereas, the several lines of telegraph can much better serve the purposes of the public and of the Railroads and Telegraph Company if operated in connection with each other and as parts of a system;

Now, Therefore, for and in consideration of the covenants and agreements herein contained, the parties hereto mutually agree as follows:

Section I.

OWNERSHIP. It is understood and agreed that the Railroad Companies now own all the poles and wires and other telegraph property, excepting only receiving and transmitting instruments, enumerated in Schedule "A" hereto attached; and it is understood and agreed that the Telegraph Company now owns all the poles and wires and other telegraph property enumerated in Schedule "B" hereto attached. The Telegraph Company agrees to and does hire the lines of poles and wires

enumerated and described in said Schedule "A", except the poles and wires set apart for the separate use of the Railroad Companies or of the Pacific Company. In order to avoid unnecessary duplication of poles and to secure economy of maintenance and operation, either company shall have the right to place wires for its own business on the poles belonging to the other Company free of rental.

Section 2.

CONSTRUCTION OF NEW LINES. The Telegraph Company agrees to furnish, at its expense, at some point on the line of the railroads covered by this agreement, all poles, wires, insulators and other necessary material, and all labor, both skilled and unskilled, for the construction of and to construct a line of poles, and one wire or more, along any future extensions and branches of railroad, within the United States and Territories covered by this agreement, upon which there may be no line of telegraph, and to provide such material and labor for the construction of, and to construct, additional lines of poles and lines of wires, where the existing lines have not sufficient capacity to meet the requirements of the business, but nothing herein shall be construed as requiring the Telegraph Company to furnish at its expense additional lines of poles or additional wires for railroad business, in excess of the wires provided for such business in Sections six and seven of this agreement. The ownership of the telegraph lines so constructed is to be vested in the Telegraph Company.

Section 3.

RECONSTRUCTION OF OLD LINES. A. On all lines of railroad, extensions and branches thereof, now or hereafter covered by this agreement, where there is but one line of poles, the ownership of which is vested in the Telegraph Company, that Company agrees to furnish at its expense, at some point on the lines of railroad covered by this agreement, all poles, wires, insulators and other necessary material, as well as all labor, both skilled and unskilled, for the reconstruction of and to reconstruct the said line of poles and wires thereon, including wires set apart by it for railroad business exclusively.

B. On all lines of railroad, extensions and branches thereof, now or hereafter covered by this agreement, where there is but one line of poles, the ownership of which is vested in the Railroad Company, it shall be optional with the Railroad Company to reconstruct such line at its expense, both as to material and as to labor, both skilled and unskilled, or to call on the Telegraph Company to do so, in which case the Telegraph Company binds itself to reconstruct such lines of poles and the wires thereon, including wires set apart for railroad business exclusively, furnishing, at its own expense, at some point on the railroads covered by this agreement, all poles and wires (except wire to replace such railroad wires as are not fit to transfer, or as may require reconstruction after transfer, during the continu-

ance of this agreement), and also insulators and other necessary material, as well as all labor, both skilled and unskilled, for such reconstruction, and also binds itself to transfer, free of expense to the Pacific Company, to such reconstructed line, such wires as are owned by the Railroad Company which are fit to transfer, the ownership of the reconstructed line to be vested in the Telegraph Company, excepting only that the ownership of the transferred and replaced or reconstructed railroad wires shall remain vested in the Railroad Company, the Railroad Company to furnish, at its expense, new wire to replace such Railroad wires as are unfit to transfer, or as may require reconstruction after transfer, and the Telegraph Company agrees to erect the same on its poles at its own expense.

C. On all lines of railroad, extensions and branches thereof, now or hereafter covered by this agreement, where there are two lines of poles, the ownership of one being vested in the Telegraph Company, and the ownership of the other in the Railroad Company, the reconstruction of the Telegraph Company's line is to be covered by clause A of this section.

When the Railroad Company's line requires reconstruction, it shall be optional with it to reconstruct it at its entire expense as to material and all labor, both skilled and unskilled, or to abandon the line, in which latter case the Telegraph Company binds itself to transfer the Railroad Company's wires, that are fit to trans-

fer, to the Telegraph Company's line of poles free of expense to the Pacific Company, in whose ownership such transferred or replaced wires shall remain vested, the Railroad Company to furnish at its own expense new wire to replace such wires owned by the Railroad Company as are unfit to transfer, or as may require reconstruction after transfer, and the Telegraph Company agrees to erect the same on its poles at its own expense. All wires, fixtures and equipment now owned or hereafter paid for by the Railroad Company shall be and remain its property (but its property rights in these poles taken down and abandoned shall cease and determine when they shall have been taken down).

It is understood that "Reconstruction" under this agreement, means the renewal of poles and wires along any section of road where the old material is worn out by age, or has been destroyed by the action of the elements, or has become so defective from any cause as to render its continued use seriously inconvenient. Reconstruction includes the erection of new lines required by changes of track from one route to another route, and cost of taking down lines from such former routes.

Section 4.

MAINTENANCE OF ALL LINES. The Telegraph Company will, without charge to the Pacific Company, furnish poles, wires, insulators and all other necessary material for the maintenance in good order and

repair of all telegraph lines now or hereafter covered by this agreement, whether the ownership be vested in the Telegraph Company or in the Railroad Companies, including future extensions or branches of all or any of said railroads covered by this agreement.

The Pacific Company agrees to furnish, at its expense, all the labor, including necessary skilled linemen, to maintain in good order and repair, all lines of poles and wires now or hereafter covered by this agreement, whether the ownership be vested in the Telegraph Company or in the Railroad Companies, including future extensions or branches of all or any of said railroads covered by this agreement.

It is understood that "Maintenance", under this agreement, covers all expenses (whether for material or labor) required for the maintenance of lines of poles and wires in good order and repair; it includes such expenses involved in changes of lines required by construction of side tracks and embankments, or by the erection of structures on the right of way. Maintenance also includes connection and changes of office leads, and generally such office and battery works as can be performed by linemen regularly employed without interfering with other duties; also, labor required to repair damage by storms and inclement weather when such damage does not involve reconstruction.

It is understood and agreed that the Pacific Company shall exercise the same care and diligence in the mainte-

nance and repair of the wire or wires that the Telegraph Company has, or may have along said railroads for its business, that the Pacific Company does in the maintenance and repair of the wire or wires used exclusively by it; and it is furthermore understood and agreed that the Pacific Company will not be required to furnish any labor required for the maintenance, repair or reconstruction of any submarine cables connecting with, or forming part of, the telegraph system covered by this agreement.

Section 5.

WIRES IN TOWNS OR CITIES FOR RAILROAD USE. The Telegraph Company will without charge, furnish on the poles which it has or may have, in towns or cities on the lines, or at the termini of said railroads, covered, or which may hereafter be covered, by this agreement, a connection between the railroad wire or wires and the general offices of the Pacific Company in such towns or cities, and wherever the Telegraph Company possesses available conduits and poles, it will furnish connections between the railroad wire or wires and the subordinate offices of the Pacific Company located in such towns or cities, for the transmission of its railroad business to and from such offices. And, in cases where it may be necessary to furnish such connection by underground wires, the Telegraph Company will, upon request of the Pacific Company, furnish such underground wires in any conduit which the Telegraph Company may then have.

The Telegraph Company will furnish conductors in submarine cables for the main wires owned by the Railroad Companies, or set apart for their exclusive use under this agreement.

Main Batteries. The Telegraph Company further agrees to furnish without charge, main batteries and battery stands, for the operation of the wire provided for in this Agreement, the Pacific Company to furnish the labor for maintaining such batteries, except in large stations, where the Telegraph Company had regular battery-men.

Section 6.

WIRES TO BE USED FOR RAILROAD BUSINESS. The Pacific Company shall continue to use exclusively, or jointly, as the case may be, for the transmission of its railroad and steamship business, the wires now respectively used by it, either exclusively or jointly, as the case may be, along said railroads covered by this agreement, said wires being shown in Schedules A. C. D. and E. hereto attached.

In case of the interruption of said wires, the business of both parties hereto, shall, as far as practicable, be done over the working wire, important railroad messages directing the movement of trains having precedence.

Section 7.

USE OF WIRES ALONG FUTURE EXTENSIONS OR BRANCHES AND ADDITIONAL RAILROAD WIRES ALONG ANY OF THE RAILROADS.

The Telegraph Company agrees to set apart the first wire erected along future branches and extensions for the joint use of the parties hereto, it being agreed that the Pacific Company's messages of an important character, directing the movement of trains, shall have precedence over said joint wires. Whenever the business of the Pacific Company shall require the exclusive use of the said joint wire, the Telegraph Company agrees to provide, at its expense, a wire for commercial business, after the erection of which the joint wire shall be set apart for the Pacific Company's business and for such commercial business as can be done thereon without interfering with the Pacific Company's business.

If the Pacific Company shall, at any time, require the exclusive use of any additional wires along any part of the railroads and branches or extensions now or hereafter covered by this agreement, the Telegraph Company shall, after receipt of written notice so to do, set apart suitable pole space, without charge to the Pacific Company, for the reception of the additional wire, the entire cost of which wire with its insulators, including labor, both skilled and unskilled, shall be borne by the Pacific Company.

Section 8.

FREE TELEGRAPH SERVICE FOR RAILROAD BUSINESS, ETC.

All messages of officers and agents of the Pacific Company, pertaining to its business, may be transmitted without charge on wires used or set apart for said business or used jointly by the Telegraph Company and the Pacific Company between all telegraph offices of both parties hereto at places on, along and adjacent to or at the termini of the railroads now or hereafter covered by this agreement.

The Telegraph Company agrees to issue to such officers of the Pacific Company, or of the companies owning the respective railroads in respect to which this agreement is made, as may be designated by the Chairman of the Board of Directors, the Chairman of the Executive Committee, the President or General Manager of the Pacific Company, annual franks, authorizing the free transmission of messages relating strictly to the business of the Pacific Company or of the Companies owning such railroads, originating at or destined to points on the Telegraph Company's lines in the United States, beyond or off the lines of said railroads covered by this agreement, to an amount not exceeding Fifteen Dollars (\$15.00) per mile per annum, for each mile of railroad now or hereafter covered by this agreement. The tolls on all such messages to or from points beyond or off the lines of said railroads, shall be calculated at the regular commercial day rates of the Telegraph Company, between the points at which said messages are

delivered to the Telegraph Company and the points to which they are destined; and the Pacific Company agrees to pay the Telegraph Company one-half of such rates on all messages in excess of said amount so allowed to be transmitted free, settlement to be made yearly.

It is understood and agreed that the free telegraphic service under franks herein provided for, applies only to the transmission of messages concerning the business of the Pacific Company or of the Companies owning such railroads, and shall not be extended to any messages for transmission by cable, nor to messages containing market quotations, or prices of commodities, or messages ordering sleeping-car, parlor-car or steamer berths on foreign car or steamer lines (excepting, however, the Pacific Mail Steamship Company and the Occidental and Oriental Steamship Company or their successors), merchandise or accommodations for customers of the Pacific Company, the tolls on which messages shall be paid for by such customers.

Section 9.

EXCLUSIVE RIGHT OF WAY. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance and operation of lines of poles and wires and underground or other lines for commercial or public tele-

graph and public telephone uses or business, with the right to construct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder.

Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other Companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained against the Railroad Company in respect to any of the matters in this section mentioned.

Section 10.

PATENT RIGHTS. The Pacific Company shall have the right without charge therefor to the full use of any telegraphic or telephonic patent rights or new dis-

coveries or inventions that the Telegraph Company now owns and uses in its general telegraph business, or which it may hereafter own and use as aforesaid, so far as the same may be necessary or convenient in properly carrying on the business of railroad telegraphing or telephoning on the lines of said railroad, as provided herein.

Section 11.

TELEGRAPHIC OFFICES. Either party to this agreement may establish and maintain telegraph stations at such places on the railroads covered by this agreement as it may deem necessary or convenient, and at all such places where the Railroad Company may establish offices the Telegraph Company agrees to furnish instruments and local batteries, also blank forms and stationery for commercial business.

The Telegraph Company also agrees to employ and furnish a messenger for the delivery of messages at all railroad stations where there shall be on an average a daily delivery of ten paid messages.

At all telegraph stations of the Pacific Company, along the railroads covered by this agreement, it shall furnish operators at its own expense; and its operators and other employes acting as agents of the Telegraph Company shall receive, transmit and deliver exclusively for the Telegraph Company, except as provided above, such commercial or public messages as may be offered, and shall charge the tariff rates of the Telegraph Com-

pany therein, and shall render to the Telegraph Company, exclusively, monthly statements of such business, and full accounts of all receipts therefrom; and the Pacific Company agrees to prescribe that said operators shall pay to the Telegraph Company all of such receipts in such manner and at such times as the Telegraph Company may direct; but the Pacific Company shall not be held liable for receipts from commercial or public telegraph business not paid over to the Telegraph Company by said railroad employees.

Such operators and other employees shall not, without the consent of the Telegraph Company, transmit over said telegraph lines any free messages except those herein provided for, and concerning all commercial telegraph business, whether paid or free, shall conform to all rules, regulations and orders of the Telegraph Company applicable thereto.

The Pacific Company agrees, so far as it legally may, that no employe of the Pacific Company on the roads covered by this agreement shall, while in its service be employed in the transaction of commercial or public telegraph or telephone business in competition with the Telegraph Company, party hereto; and the Telegraph Company shall, so far as the Pacific Company can lawfully grant the same, have the exclusive right to the occupancy of the railroad depots and station houses on and along the roads covered by this agreement, for commercial or public telegraph and public telephone business, as against any other party. Provided always

that, in protecting and defending said rights to such occupancy, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any of the companies owning the railroads in respect of which this agreement is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgements or decrees which may be obtained against the Railroad Company in respect to any of the matters in this section mentioned.

Provided, however, that nothing in this agreement shall prevent the Railroad Company from having or establishing joint depots or station houses with other railroad companies, and that this agreement shall not be deemed violated by the occupancy of such joint depots or station houses for telegraph or telephone purposes by the parties using them jointly with the Railroad Company.

Section 12.

INDEPENDENT OFFICES IN RAILROAD STATIONS.

If the Telegraph Company elects to establish an independent office at a station of the Pacific Company on the road covered by this agreement, the Pacific Company shall furnish office room, light and fuel, free of charge, in such station; and if, at such station, one person can attend to the telegraph business of

both parties hereto, the agent of the Telegraph Company, acting for and as the agent of the Pacific Company in the premises, shall do such business of the Pacific Company without charge.

Whenever the number of paid and collect messages sent from any one office of the Pacific Company on the roads covered by this agreement exceeds an average of fifteen per day for three successive calendar months, the Telegraph Company agrees to furnish an operator for such office each month thereafter during which said messages sent from said office exceeds said average number per day; and said operator, acting as the agent of the Pacific Company, shall attend to its railroad telegraphing without charge so long as said operator can attend to the telegraph business of both parties hereto.

Whenever the Telegraph business of both companies at any office where the Telegraph Company furnishes the operator becomes so large that more than one operator is needed to attend to it, then the Pacific Company shall employ and pay its own operator.

Either party hereto may operate by telephone instruments to be furnished by it the wires regularly used or hereafter erected for its business under this agreement, provided that such use does not interfere with the use of such wires by the other party hereto, as provided herein, but the use of the telephone by the Railroad Company shall not release the Railroad Company from its obligations to the Telegraph Company in the trans-

action of commercial telegraph business as hereinbefore provided.

Section 13.

FREE TRANSPORTATION. The Pacific Company agrees to transport free of charge over the railroads covered by this agreement, upon application of the President or Superintendent of the Telegraph Company, all persons in the employ of the Telegraph Company, when traveling on the business of said Company; and also to transport and distribute free of charge, along the line of said railroads, all poles and other material and supplies, for the construction, maintenance, operation, repair and renewal or reconstruction of the lines and wires covered by this agreement, and of such additional wires and lines of poles and wires as may be constructed under the provisions of this agreement, and all material and supplies for the establishment, maintenance and operation of the offices of both parties hereto, at places on, along and adjacent to or at the termini of said railroads; it being understood that all poles and other material and supplies for use on any of said railroads and in any of said offices shall be transported free over any or all of said railroads covered by this agreement, or over the Sacramento and Marysville Steamboat Lines.

The Pacific Company also agrees to transport, free of charge, over the railroads covered by this agreement, all old material and supplies, except poles and cross

arms, collected from the offices, or from the lines along said railroads, and returned to the Telegraph Company's supply department.

The Pacific Company also agrees to furnish and transport free of charge, hand, boarding and outfit cars, when required in all work of construction and reconstruction under this contract.

Section 14.

LINES TO FORM PART OF TELEGRAPH COMPANY'S GENERAL SYSTEM. It is mutually agreed that the telegraph lines, poles, wires and fixtures, covered by this contract, whether owned by the Telegraph Company or the Pacific Company, shall in their general operation form part of the general telegraph system of the Telegraph Company, and shall be controlled and regulated generally by the Telegraph Company, which shall fix and determine all tariffs for the transmission of messages and all connections with other lines and wires.

It is understood and agreed that the Pacific Company may arrange with its connecting roads for the exchange of messages over railroad wires relating to its own and said connecting roads' joint business between points on its own road and points on said connecting roads, so far as may be necessary for the prompt despatch of such joint business, and to place the Pacific Company on an equal footing with railroads competing

with it. Such messages to be handled wholly by railroad operators over railroad wires, and not to be charged up to the free telegraphic services provided for in this agreement.

Section 15.

EXEMPTION FROM LIABILITY. It is a condition of this contract that the Pacific Company is not to be responsible for, and the Telegraph Company hereby covenants and agrees to save the Pacific Company harmless and indemnify it against, any loss or damages of any kind arising from the death of or any injury to any persons in the employ of, or the loss or destruction of or any damage or injury to any property belonging to or designed for, the Telegraph Company, while being carried over said railroads under this agreement, and from any error, failure or default in the transmission or delivery of messages for any person doing business with the Telegraph Company, and on account of any other public telegraph business. And the Telegraph Company shall not be responsible for, and the Pacific Company agrees to indemnify and save harmless the Telegraph Company against any loss or damage of any kind arising from or on account of any error, failure, delay or default, in the transmission or delivery of any and all messages sent for the Pacific Company under this agreement.

The Telegraph Company hereby promises and agrees to assume and protect the Railroad Company

from the payment of all taxes levied and assessed upon the telegraph property belonging to or used by the Telegraph Company under this agreement.

Section 16.

SUPERSEDES FORMER AGREEMENTS.

It is mutually agreed that the provisions of this agreement shall, upon its taking effect, supersede and terminate the following named contracts:

Agreement of April 1, 1871, between the Western Union Telegraph Company and the Oregon and California Railroad Company.

Agreement of December 14, 1877, between the Western Union Telegraph Company and the Central Pacific Railroad Company, Southern Pacific Railroad Company, and a number of affiliated railroad companies.

Agreement of September 8, 1880, between the Western Union Telegraph Company and the Carson and Colorado Railroad Company.

Agreement of January 15, 1892, between the Western Union Telegraph Company and the Oregon and California Railroad Company, the Oregonian Railway Company and the Portland and Willamette Valley Railroad Company.

Agreement of February 18, 1880, between the Western Union Telegraph Company and the Western Ore-

gon Railroad Company.

Section 17.

JOINT SUPERINTENDENT OF TELEGRAPH.

It is further agreed that the management of the wires, the repairs of the lines along the Pacific Company's railroads, the employment of line-men and the distribution of all materials for use on said lines, shall be under the supervision and control of a competent Joint Superintendent of Telegraph, who shall be appointed and paid jointly in equal shares by the two parties hereto.

The salary of said Superintendent shall be fixed by mutual agreement, the Telegraph Company to pay directly to said Superintendent its half of his salary as fixed by the parties hereto, and the Railroad Company to pay the remaining half thereof. Said Superintendent shall be equally the servant of each of the parties hereto, and shall, as far as practicable, protect and harmonize the interests of both parties hereto in the transaction of the railroad and commercial telegraph business along the Railroad Company's railroads.

Either party to this agreement may discharge said Superintendent for cause, but his successor shall only be appointed on the written consent of both parties.

Said Superintendent shall be subordinate to and under the control of the Telegraph Company, so far as necessary to enforce said Company's rules and regula-

tions and orders in regard to the construction, maintenance, repair and reconstruction, operation, arrangement and management of its lines and wires, and the transaction of its commercial business, and shall assist the said Company in such matters so far as his duties to the Railroad Company will permit; it being understood and agreed that he shall co-operate with both parties hereto in giving the utmost efficiency to the working of the lines upon said railroads and the transaction of the railroad and commercial telegraph business. A suitable office and supply rooms for said Superintendent shall be provided by the Railroad Company.

The Telegraph Company shall supply and pay the expenses of such clerical labor as it may deem necessary to furnish for said Superintendent in the transaction of its commercial or public telegraph business.

Section 18.

COMPENSATION TO BE PAID TO PACIFIC COMPANY. The Telegraph Company agrees to pay annually to the Pacific Company, in quarterly instalments, the sum of \$80,000 in United States gold coin, for the advantages accruing to the Telegraph Company hereunder.

Section 19.

TERM. This agreement shall take effect July 1st, 1901, and shall continue in force until July 1st, 1926,

and thereafter until the expiration of one year after written notice given by either party to the other of its intention to terminate the same.

Provided, however, that at the expiration of the first five (5) years from the date hereof, and at the expiration of each and every five (5) years thereafter, either of the parties hereto shall have the right, after having given to the other party thirty (30) days previous notice in writing to require a reconsideration and readjustment of the terms of this agreement, so as to relieve either party from unnecessary or unreasonable burdens, and to secure both the largest benefits on the most equitable terms.

This agreement shall not be construed as requiring either party hereto to do any act in violation of its charter powers or of any valid law or statute applicable to such party or in violation of its duties to the public, and if any provision herein is found hereafter by any Court to be in violation of law, then only such provisions shall be null and void, and the remaining portions of the contract shall be held valid and binding on the parties hereto. Nor shall either party hereto be charged with breach of this contract because of compliance with any statute, until such statute shall have been declared invalid by a Court of competent jurisdiction.

IN WITNESS WHEREOF, the parties to these presents have caused the names of their proper officers

to be hereunto subscribed, and their corporate seals to be hereto affixed and attested, the day and year first above written.

**THE WESTERN UNION TELEGRAPH
COMPANY.**

(Seal)

By **THOS. T. ECKERT,**
President.

A. R. BREWER, Secretary.

THE SOUTHERN PACIFIC COMPANY.

(Seal)

By **E. H. HARRIMAN,**
President.

ALEX. MILLAR, Secretary.

WHEREFORE, This Defendant having fully answered, confessed, traversed and avoided or denied all the material matters in said Supplemental Bill according to its best knowledge, information, understanding and belief, and having made full discovery and set forth in detail the contract between the Southern Pacific Company and the Western Union Telegraph Company as in said Supplemental Bill prayed, now prays that said Supplemental Bill be dismissed and that this Defendant be allowed its reasonable costs and charges so unjustly sustained.

RUFUS MALLORY,
Of Solicitors for Defendants.

DOLPH, MALLORY, SIMON & GEARIN,

Counsel for Defendant.

(Endorsed)

Answer of Western Union Telegraph Co.

Filed December 13, 1912.

A. M. CANNON,

Clerk.

And afterwards, to-wit, on the 31st day of December, 1912, there was duly filed in said Court, a Replication in words and figures as follows, to-wit:

(Replication of Postal Telegraph Company to Answer of Western Union Company.)

(Title.)

The replication of the Postal Telegraph Company, a corporation, complainant, to the answer of Western Union Telegraph Company, a defendant:

This replicant saving and reserving unto itself now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain and prove its said supplemental bill of complaint to be true, certain and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this replicant. Without this that any other matter or things whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true. All which matters and things this replicant is and will be ready to aver, maintain and prove as this honorable Court shall direct, and humbly prays as in and by its bill it has already prayed.

Western Union Telegraph Co.

O. W. POWERS,
THOS. MARIONEAX,
ROGER B. SINNOTT,
LORING K. ADAMS,

Solicitors for Complainant.

(Endorsed)

Replication to Answer of Western Union Telegraph Co.

Filed December 31, 1912.

A. M. CANNON,
Clerk.

And afterwards, to-wit, on the 6th day of October, 1913, there was duly filed in said Court, an Opinion in words and figures as follows, to-wit:

(Opinion.)

(Title.)

Wolverton, District Judge:

This suit was instituted by the Postal Telegraph Company against the Southern Pacific Company, a corporation engaged in railroad transportation service, to enjoin it from interfering with the Postal Company's maintenance of poles, lines and equipment for operating a telegraph system along, and in some places upon, the right of way upon which its railroad is constructed and operated.

The line of the road and right of way involved, as shown by the bill, extends from the station of New Era to the City of Eugene, a distance of 103 miles. Poles stand on the right of way for a distance of about 4 miles out of the 103, being so placed, in two or three sections, to avoid planting them upon private property, where permission so to do could not be obtained. In the larger portion of the distance, however, they are set just outside of the railroad company's right of way, so that the cross-arms for stretching the wires overhang the same.

The Southern Pacific Company is operating under a

lease from the Oregon and California Railroad Company, the road being a land grant railroad and a post road of the United States. The complainant has accepted and is operating under the provisions of the act of July 24th, 1866, authorizing it to construct its lines of telegraph over and along the military and post roads of the United States. See Sections 5263 and 5268 R. S.

The defendant Southern Pacific Company answered the bill of complaint, and, while engaged in taking testimony by deposition in New York, the parties (Southern Pacific Company and Postal Telegraph Company) entered into negotiations between themselves for the adjustment of their differences, not only pertaining to the telegraph line from New Era to Eugene, but to the entire line extending from Portland to Ashland. They proceeded so far that a draft of their proposed contract of settlement was prepared by the attorney of the Southern Pacific Company and submitted to complainant, which in all essentials was satisfactory to complainant, while it suggested certain minor changes by interlineation, and which, after further conference, was practically concurred in by both parties as a complete settlement and adjustment of their said differences. The Southern Pacific Company, however, before executing said contract, submitted the same for its approval to the Western Union Telegraph Company, with which company it has a contract extending certain rights and privileges for the construction and maintenance of telegraph lines upon its right of way. The Western Union refused

to approve the agreement, and the Southern Pacific, as I understand the controversy, now declines to complete its negotiations with the Postal Company solely because of such refusal. The Western Union has also complied with the act of July 24th, 1866, and is entitled to the privileges thereby granted telegraph companies over and along post roads.

Based upon these subsequent occurrences, the Postal Company filed a supplementary complaint setting them forth, and praying that the Western Union might be brought in and made a party to the suit and required to make answer why it should delay or defeat such negotiations of settlement.

The Western Union answered, setting up a contract with the Southern Pacific Company, and claiming thereby a grant of the exclusive use of the latter's right of way for the construction and maintenance of its telegraph system. The portion of the contract which effects the question involved is section 9, and reads as follows:

"EXCLUSIVE RIGHT OF WAY. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance and operation of lines of poles and wires and underground or other lines for commercial or public telegraph and public telephone uses or business, with the

right to construct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder.

Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

“And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained against the Railroad Company in respect to any of the matters in this section mentioned.”

Among other things, the Western Union avers:

“That it claims the right to object to or prevent such or any settlement as will or may involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and

the complainant, this defendant claims no right to object, unless its approval of such proposed settlement is made a condition upon which the Southern Pacific Company undertakes to execute such agreement, in which case this defendant claims that it may withhold its assent and thereby prevent the execution of said agreement whether this defendant has any interest in or is to be affected by such agreement or not."

The Western Union has further taken over the entire defense of the cause, and the Southern Pacific Company is now but a nominal party. The controversy is thus reduced to very narrow limits: Can the Western Union, under its contract with the Southern Pacific Company, defeat the latter's negotiations with the Postal Company by simply refusing to approve the contract agreed upon?

It is alleged and claimed on the part of the Postal Company that the contract of the Western Union with the Southern Pacific Company, in so far as the latter company has granted to the former the exclusive right and privilege of occupying its right of way for maintaining telegraph lines, contravenes the purposes of the act of August 7, 1888 (25 Stat. 382), and is therefore nugatory and void. It does not seem to be alleged or claimed by the Western Union that the plaintiff's construction and maintenance of its system interferes in any way with the Western Union's occupation and use of the railroad's right of way for its uses and purposes. I take it that the question thus presented in practical effect is

concluded by the adjudication of the Supreme Court in *United States v. Union Pacific Railway*, 160 U. S. 1. Under that decision, the clause of the Western Union contract above quoted, in so far as it attempts to guarantee to that company the exclusive privilege of occupying the railroad's right of way for the maintenance of its telegraph lines, is utterly void and of no consequence. The Western Union could not therefore rightfully or legally object to the consummation of the agreement between the Southern Pacific Company and the plaintiff, and any objection that it might interpose, or approval that it might withhold, could not stand in the way of such negotiations. In this view, the Western Union can in no way be injured by the negotiations, and ought not to be heard to interpose objections thereto.

I conclude that the defendant Southern Pacific Company should be authorized, permitted and directed to conclude said agreement with the plaintiff company, and this notwithstanding the want of assent of the Western Union, and that the Western Union should be enjoined and restrained from further interfering with such negotiations, and such will be the decree of the Court.

The complainant is entitled to its costs and disbursements.

(Endorsed)

Opinion.

Filed October 6th, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to-wit, on the 3rd day of November, 1913, there was duly filed in said Court, a Decree in words and figures as follows, to-wit:

(Decree.)

(Title.)

This case came on regularly to be heard on the 15th day of May, 1913, Messrs. Orlando W. Powers, Thomas Marionaux, Roger B. Sinnott and Loring K. Adams, appearing for complainant; Wm. D. Fenton, James E. Fenton, Ben C. Dey, and Kenneth L. Fenton appearing for Southern Pacific Company; and Rufus Mallory, and Dolph, Mallory, Simon & Gearin appearing for Western Union Telegraph Company; and after hearing the testimony in said case and the arguments of counsel, and after duly considering the evidence introduced, and the pleadings herein, and the arguments of counsel;

It is ORDERED, ADJUDGED and DECREED as follows: That the contract of the Western Union Telegraph Company, Defendant, with the Southern Pacific Company, Defendant, mentioned and set forth in the supplemental bill and the answer of the Defendant, Western Union Telegraph Company, filed in this case, in so far as the said Western Union Telegraph Company is by said contract granted the exclusive right and privilege of occupying the right of way of the South-

ern Pacific Company for maintaining telegraph lines, is contrary to public policy, nugatory and void, and of no effect whatever.

It is further ORDERED, ADJUDGED and DECREED that the Defendant, Southern Pacific Company, is hereby authorized, permitted, directed and commanded to conclude that certain agreement with the Complainant, Postal Telegraph Company, mentioned in the pleadings in this case, which is, in words and figures as follows, to-wit:

“KNOW ALL MEN BY THESE PRESENTS: That the Southern Pacific Company, a corporation, duly organized and existing under the laws of the State of Kentucky, having an office and place of business and authorized to transact business in the State of Oregon and elsewhere, as party of the first part (hereinafter called the Southern Company), and the Postal Telegraph Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in said State of Oregon, as party of the second part, (hereinafter called the Postal Company), and the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in the State of Oregon, as party of the third part (hereinafter called the Oregon Company), have made and entered into the following agreement, to-wit:

FIRST: That the Southern Company and the Oregon Company, for and in consideration of the premises and the covenants and agreements hereinafter contained to be fulfilled and performed by the respective parties hereto, hereby grant unto the Postal Company the right to maintain and operate along and upon those certain portions of the right of way of the Oregon Company between Portland and Myrtle Creek and between Myrtle Creek and Ashland in the State of Oregon telegraph poles with cross arms and wires now thereto attached or to be attached, belonging to said Postal Company as now located upon said right of way; also the right to maintain and operate cross arms with telegraph wires thereon extending and suspended over those portions of the right of way of the Oregon Company hereinabove described, and attached to said telegraph poles of said Postal Company as now located adjacent to and without said right of way of the Oregon Company now leased to the Southern Company, together with the right to reconstruct or renew said poles and cross arms in their present location, and to attach cross arms thereto and string wires thereon and to occupy said portions of said right of way for the purposes of the Postal Company, subject to the terms, conditions and provisions hereinafter contained.

SECOND: (1) The consideration therefor agreed to be paid by the Postal Company is at the rate of Ten Dollars per mile of said right of way where used or occupied by the Postal Company, payable to the Southern Company as hereinafter provided.

(2) The Postal Company shall at once begin and proceed with the work of reconstruction of said poles and wires, and as the work progresses surveys shall be made showing the locations of the poles on said right of way and of poles adjacent to said right of way supporting cross arms that overhang the right of way. The mileage of said right of way used or occupied by the Postal Company shall then be computed by the Postal Company by counting the said poles and dividing the number by 35. Said payment at the said rate on the mileage so computed is to be made by the Postal Company within thirty days after receipt of bills therefor based upon said surveys and rendered by the Southern Company.

THIRD: It is agreed by the parties hereto that the Postal Company has and shall have, and be let into, the possession, operation and control of the said portion of said right of way for telegraph and telephone purposes and the reconstruction, maintenance and operation of its telegraph line as now located over and along and adjacent to said right of way as hereinbefore described.

FOURTH: It is further covenanted and agreed by the Postal Company that the said telegraph line, when and as reconstructed, shall be so reconstructed as to consist of a single line of poles not less than twenty nor more than twenty-five feet in length, including length underground, planted firmly in the ground at a depth of not less than four feet. Said telegraph line shall be reconstructed according to the most improved methods

of construction. At highway crossings, or where obstructions exist, said poles shall be of such height as required by law, or by the physical conditions existing at such places, or to protect other wires or structures rightfully upon said right of way. Said poles shall be set one hundred and fifty feet apart, making a total of thirty-five poles to the mile, excepting at sharp angles, where they may be set at not less than seventy-five feet apart, and around curves, where they may be set one hundred and seventeen to one hundred and thirty-one feet apart, with one or more cross arms at or near the top of said poles. Said cross arms shall not exceed ten feet in length and shall be fastened about the middle of the cross arms to the pole, upon which cross arms there shall be attached insulators, and upon which cross arms there shall be strung, from pole to pole, a sufficient number of wires to transact the business of the Postal Company. The Postal Company is hereby given the right to replace its present cross arms on said poles by cross arms of any length, not to exceed ten feet, and to add to said cross arms from time to time, but in no case are any cross arms to exceed ten feet in length.

FIFTH: The Postal Company further covenants and agrees that wherever it now is or hereafter becomes necessary to cross the railroad track of said railroad the said poles shall be of such height above the ground and the wires strung so high as to prevent any interference with the operation and conduct of its business, and so as

not to endanger the life or limb of its employees or other persons having occasion to be upon said right of way. Each of said cross arms shall be constructed, maintained and operated subject to the reasonable terms and conditions contained in the usual form of wire crossing agreement then used by the Southern Company, which agreement shall be executed by both the Postal Company and the Southern Company, without consideration other than the considerations of this agreement.

SIXTH: If at any time the Southern Company or the Oregon Company, or either of them, need any portion of said right of way where said poles and lines are strung, then, in such event, the Postal Company, upon reasonable notice, at its own expense shall remove the same to some other point or points upon said right of way that may be designated by the Southern Company and the Oregon Company, or either of them. And, in the event that it shall become necessary in the operation and maintenance of the railroad system of the Southern Company or the Oregon Company, at any point between Portland, Oregon, and the Oregon and California state line, or any point mentioned herein, to use the entire right of way for railroad purposes, or to use any part thereof occupied by the Postal Company, then and in that event, upon reasonable notice, the Postal Company shall, at its own expense, remove its poles and wires from said right of way at the point or points designated by the President of the Southern Company as necessary as aforesaid.

SEVENTH: It is further covenanted and agreed by the Postal Company that said Postal Company shall not attach or maintain wires or fixtures of any kind to any bridges, trestles, buildings, or structures of the Southern Company or the Oregon Company or of the Western Union Telegraph Company and shall not erect any of its poles upon any of the embankments of the Southern Company or the Oregon Company, and shall not place or maintain its poles nearer than five feet to the rim of cuts, and shall only occupy such portions of the said right of way of said railroad companies as are now occupied by said Postal Company, except as provided in paragraph Sixth and except that the number of cross arms not exceeding ten feet in length may be increased at any time and from time to time, thus adding to the number of existing overhangs without further consideration, and as are not being used by the said Southern Company or the Oregon Company for railroad purposes, or such portions thereof as are not being used by the Western Union Telegraph Company.

EIGHTH: The Postal Company further covenants and agrees that its telegraph line shall be so constructed that it will not come in contact with or interfere with any telegraph line already constructed on the said right of way of the Southern Company and the Oregon Company, and it is further agreed that the Postal Company shall in all manner comply with the Statutes of the State of Oregon in the reconstruction of its line of telegraph aforesaid, and with any decree that may be

entered in that certain suit now pending in the District Court of the United States for the District of Oregon, wherein the Postal Telegraph Company, a corporation, is Plaintiff, and the Southern Pacific Company, a corporation, is defendant, and known in said Court as No. 3829.

NINTH: It is further agreed by and between the parties hereto that the Postal Company may enter upon the right of way of the Southern Company and the Oregon Company as aforesaid, and reconstruct its telegraph line as set forth herein, but that the poles of said Postal Company erected and maintained upon the right of way of the Southern Company and the Oregon Company shall not be placed and / or / maintained within falling distance of any telegraph line now on said right of way, except that wherever by the topography of the country, highways, buildings or lack of width of the right of way, or the nearness of the existing telegraph line to the easterly or westerly line of said right of way, the poles of the telegraph line of the Postal Company, by reason of the height or otherwise, shall be within such falling distance, then and in that event, said poles of the Postal Company shall be guyed in accordance with improved methods of construction. It is hereby expressly agreed, everything to the contrary herein contained notwithstanding, that in the event the Postal Company shall remove any of its poles, cross arms or wires from said right of way of the Oregon Company, except for the purpose of rebuilding or repairing, that such removal shall constitute an aban-

donment by the Postal Company of any and all rights it may have acquired in and to such portion of said right of way from which said poles, cross arms or wires were so removed.

TENTH: It is further understood and agreed by and between the parties hereto that this argeement shall be the basis of a decree in favor of the Postal Company in the above entitled case and against the Southern Company or the Oregon Company or the Western Union Telegraph Company if added as parties to said cause, but that the Postal Company shall take no decree for costs or disbursements in said cause, and that upon the entry of said decree with a copy of this agreement therein, said Court may enter a decree in accordance with said agreement and subject to its terms and provisions, appropriating to the Postal Company so much of said right of way as is hereinbefore specifically described for its use as a telegraph company subject to the terms and provisions of this agreement, with the right of either party to this agreement to apply to said Court for the enforcement of said decree and this agreement.

ELEVENTH: This agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed in six parts by their officers thereunto duly authorized, this
day of A. D. 1912.

Executed in the presence of us:

As to the Southern Pacific Company:

.....

.....

SOUTHERN PACIFIC COMPANY,

By.....

President.

and.....

Secretary.

As to the Postal Telegraph Company:

.....

.....

POSTAL TELEGRAPH COMPANY,

By.....

President.

and.....

Secretary.

OREGON & CALIFORNIA RAILROAD
COMPANY.

By.....

President.

and.....

Secretary.

As to Oregon

& California

Railroad Company:

.....

.....

Western Union Telegraph Company hereby consents to the foregoing agreement this.....day of
....., 1912.

**WESTERN UNION TELEGRAPH
COMPANY,**

By.....

It is further **ORDERED, ADJUDGED** and **DECREED** that the Western Union Telegraph Company, Defendant, its officers, servants, agents, employees and counsel, are hereby enjoined and restrained from interfering with the execution of said contract.

It is further **ORDERED, ADJUDGED** and **DECREED** that the complainant herein recover its costs and disbursements, taxed at the sum of \$.....

Dated 3rd day of November, 1913.

CHAS. E. WOLVERTON,

Judge.

(Endorsed)

Decree.

Filed November 3, 1913.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 16th day of March, 1914, there was duly filed in said Court a Statement of Evidence in words and figures as follows, to wit:

STATEMENT OF EVIDENCE.

(Title)

It is hereby stipulated and agreed by and between the parties hereto, by their respective solicitors, that the following statement of the testimony introduced at the trial of this cause represents a true and correct summary of the testimony of the different witnesses as the same has been reduced to narrative form and been agreed upon by the parties hereto.

It is further stipulated and agreed that the testimony of Ralph H. Overbaugh be printed in full.

Frederick V. Holman,
Alfred A. Hampson,
Solicitors for Complainant.

Dolph, Mallory, Simon & Gearin,
Hall S. Lusk,
Solicitors for Defendants.

For the purpose of condensing the record in this case, it is hereby stipulated and agreed by and between the parties hereto by their respective solicitors:

I.

That the agreement between the Gulf, Colorado & Santa Fe Railway Company and Texas Telegraph Company, dated November 3, 1910, and set forth in full in this record, is fairly representative of the different contracts summarized in complainant's exhibit No. 19, and referred to in the testimony of the witness Welcome I. Capen.

II.

That the Pacific Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, and the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of Oregon, have each accepted the provisions of the Act of Congress approved July 24, 1866, entitled, "An Act to aid in the construction of telegraph lines and to secure to the government the use of the same for postal, military and other purposes," and that conclusive proof of such acceptance on the part of each of said companies was introduced at the trial of this cause.

III.

That the Postal Telegraph-Cable Company, an Oregon corporation, duly and regularly executed and filed supplementary articles of incorporation changing its name to Postal Telegraph Company, and that conclusive proof of this fact was made at the trial of this cause,

the said Postal Telegraph Company being the complainant in this cause and being the same corporation which formerly bore the name of Postal Telegraph-Cable Company and accepted the provisions of the Post Roads Act of Congress.

It is further stipulated and agreed that the proposed contract referred to in the testimony of Ralph H. Overbaugh and introduced in evidence as complainant's exhibit No. 21 is a clean copy of the proposed contract referred to in his testimony and introduced in evidence as complainant's exhibit No. 20, and that this record contains said contracts introduced as complainant's exhibits 20 and 21 with the exception that there has been omitted the particular description of the telegraph line contained in said contracts and which is not material in the consideration of this appeal.

Frederick V. Holman,

Alfred A. Hampson,

Solicitors for Complainant.

Dolph, Mallory, Simon & Gearin,

Hall S. Lusk,

Solicitors for Defendants.

Harry A. Tuttle, a witness on behalf of the complainant, testified that he was President and General Manager of the North American Telegraph Company, a position which he had occupied for two years and that

prior to the time of giving his testimony he had been engaged in the telegraph business for about 49 years, during which time he had occupied the positions of operator, Chief Operator, Manager, General Superintendent, Vice-President, General Manager and President. He stated that he had become generally familiar with the telegraph business and that he had knowledge of the operation by certain railroads of signal systems by electricity, among others the Great Northern, the Northern Pacific, the Chicago, Burlington & Quincy, the Chicago, Milwaukee & St. Paul, and the Soo line. He further testified that the Great Northern has between 250 and 260 signals, of which about 60 are those of the Union Switch & Signal Company system, most of the others of the General Railway Company, and a few of the Hall system. That these 250 or 260 signals cover the main line of about 1900 miles, part of which is single track and part double track, standard gauge. That on the right of way, in addition to the signal system, there are telegraph lines and on a short portion there is a telephone line. That there is a telegraph line on the right of way on all portions of it upon which there is a signal system and that the telegraph line and the signal system are on the same set of poles, in some very few cases on the same cross-arms, and that where the signal wires and the telegraph wires are on the same cross-arms, they are about 12 inches apart. That where the signal wires and the telegraph wires are on the same pole line but on different cross-arms, they are from 2 to 4 feet

apart. The telegraph line referred to is that of the Western Union and the signal wires and the telegraph wires have occupied the same pole line ever since the installation of the signal system on the right of way, being for a period of not less than 3 or 4 years.

Referring to the conditions on the Northern Pacific, the witness testified that it had between 30 and 40 signals, equipped with the Union Signal system, and in addition, signals of the General Railway system and of the Hall system. That these signal systems covered all of the main line of the Northern Pacific, being a distance of about 1900 miles, from Minneapolis to the Pacific Coast. He further testified that telegraph wires were maintained on the same set of poles as those upon which the signal wires were strung, and that these conditions have existed for about the same length of time as in the case of the Great Northern, that is, 3 or 4 years, or perhaps longer. That in part the road was a double track road and in part a single track road, all standard gauge. That the right of way in the middle west was about 60 feet in width, in some places wider. That the right of way of the Great Northern varies from 60 to 100 feet in width, being, of course, narrower in places, and that there are, of course, places on the Northern Pacific where the right of way is less than 60 feet in width. In the case of the latter road the witness stated the minimum width of the right of way as 18 or 20 feet and stated that upon those portions of the right of way 18 or 20 feet wide, the signal system and the telegraph line

referred to are operated on the same pole line, and that at those points there is also a standard gauge railroad track. That substantially the same conditions exist in the case of the Great Northern.

Referring to the conditions on the right of way of the Chicago, Burlington & Quincy Railroad, the witness testified that on the northern division from Chicago to Minneapolis, the Hall system of signals is used almost exclusively; that this signal is controlled by a battery in a well at the foot of the semaphore, the wires being carried from the tower house to the semaphores on the same line of poles as the telegraph wires of the North American Telegraph Company, in some instances the signal wires being on the same cross-arms as the telegraph wires and in all instances on the same pole line, in the latter case in some instances being on adjoining cross-arms. That where the signal wires and the telegraph wires are on the same crossarm they are about 12 inches apart, and when on different crossarms are from 2 to 4 feet apart. That in addition to the telegraph line of the North American Telegraph Company, the right of way is occupied in part by the telegraph line of the Western Union Telegraph Company, and that there are portions of the right of way upon which, in addition to the signal wires and the telegraph wires of the North American Telegraph Company, there are also strung the wires of the railroad company's telephone. That this condition exists between Aurora and Oregon, Illinois, a distance of about 60 miles, the pole line there being occupied by

the wires of the North American Telegraph Company, the Western Union Telegraph Company, and the signal and telephone wires of the railroad company. That such conditions have existed for about 4 or 5 years ever since the railroad began the use of a signal system. That the witness has never heard of any complaints being made by the railroad company in regard to their signal system being interfered with by induction from the telegraph wires located on the same pole line, and that he would certainly have known of such complaint if any had been made. That the width of the right of way of the Chicago, Burlington & Quincy Railroad from Chicago to Savanna, Illinois, is about 60 feet, and from Savanna, Illinois, it runs along the river where there are high bluffs, the telegraph line being up on the bluffs in many places and the tracks down by the river. That the road is what is known as a single track road, although portions of it are double track.

He testified that on the Soo line there are a telegraph line and a railroad signal system. The signal system of the Soo line is small, the signals used being known as the Taylor system. That the road has about 25 plants which are distributed over the whole line. That on the Chicago division from Chicago to Minneapolis, there are two telegraph systems, the Western Union and the North American. On the balance of the road the telegraph system is owned by the railroad company. On both, the signal wires in use are on the same line of poles with the Western Union Telegraph Company on the

Chicago division, and of the Soo line poles on the rest of their road. That the signal wires are not on the same pole lines with both telegraph lines on any part of the road. But that wherever the signal system has been installed, it is in all cases on the same line of poles upon which there is at least one telegraph line and that in most instances the signal wires are on the same cross-arms with the telegraph wires. If not on the same cross-arms, they are placed on brackets. That where the signal wires and the telegraph wires are on the same cross-arms, they are about 12 inches apart. And where the signal wires are attached to brackets, they are from 18 to 24 inches distant from the telegraph wires. That the road is a single track standard gauge road, the right of way being about 60 feet in width, although parts of it upon which this signal system and telegraph line are operated are narrower. That these conditions have existed about 3 or 4 years.

The witness further testified that he had made inquiry of the employees and officials of the Chicago, Burlington & Quincy Railroad, upon which his company maintained a telegraph line, as to whether the railroad company had had any trouble in connection with the operation of its signal system caused by induction, and that he had been informed by the signal maintainers that they had experienced no trouble whatever. The witness was asked the following question:

“Mr. Tuttle, based upon your experience as a prac-

tical telegraph man and upon your observation as to the practices of railroad companies about which you have testified with respect to the maintenance of telegraph and signal systems, and assuming that a railroad right of way is not less than 60 feet wide at all points, with the exception of about 1000 feet where it is not less than 40 feet wide, and on the center of which there is a standard gauge single track railroad and upon one side of the right of way between the railroad tracks and the edge of the right of way there is a telegraph line, and on the other side of the right of way between the tracks and the edge of the right of way there is a railroad signal system operated by electricity, would, in your opinion, the maintenance and operation of another commercial telegraph line situated on the side of the right of way upon which the railroad signal system is located so that the telegraph wires are at no point separated by less than 12 inches of air from the signal wires, cause any interference with the operation of the railroad signal system by induction?" A. "There would be no interference."

CHARLES M. BAKER, a witness on behalf of the complainant, testified that he was the Division General Superintendent of Plant of the Postal Telegraph-Cable Company, a position he had occupied about 2 years. That he had been connected with the Postal Telegraph-Cable Company for 29 years, occupying the positions of Superintendent of Construction and Assistant General Superintendent, in which positions and

through his experience he had become familiar with the telegraph business generally and the construction and operation of telegraph lines. The witness stated that during his association with the Postal Telegraph-Cable Company he has constructed telegraph lines upon railroad rights of way upon which railroad signal systems were operated by electricity. One such line was constructed on the Southern Pacific Railroad from Wells, Arizona, to Reno, Nevada, a distance of 365 miles, in 1910, at which time a signal system was operated by electricity on the same right of way. That for the greater part of the distance the telegraph line was constructed on the same side of the right of way as the signal system line but not upon the same pole line. That the signal system used was the Union Switch and Signal Company's, and that the construction of this telegraph line which forms part of the telegraph system of the complainant was done with the consent of the Southern Pacific Railroad Company.

The witness further testified that he constructed a telegraph line on the Union Pacific right of way from Omaha to Denver, and that about a year or two after the construction of this telegraph line, the Union Pacific Railroad Company constructed a signal line from La Salle, Colorado to Denver, a distance of 46 miles, and from North Platt to Columbus, a distance of 200 miles. That this signal system has been maintained upon these sections of the right of way for about five years and that for a greater portion of the distance, the signal

system was constructed on the same side of the right of way as that upon which the telegraph line had been placed. The signal system used was that of the Union Switch and Signal Company. In part the railroad is a standard gauge double track system.

The witness further testified that he had constructed a telegraph line on the road of the Illinois Central between Louisville, Kentucky and New Orleans, a distance between 800 and 1000 miles, including branches. That this work had been done from time to time within the past twelve years, and that since the construction of this telegraph line the railroad company had constructed a signal system placed on a crossarm on the pole line of the telegraph company but that no telegraph wires are on the same crossarm as the signal wires. That the signal wires are placed on the crossarm next below the crossarm upon which the telegraph wires are strung and a distance of from 24 inches to 4 feet apart. That the telegraph line in question forms part of the general system of the complainant and that the witness although he has an official position where he would certainly have been notified of complaint, has never heard of any complaint on the part of the railroad company of difficulties caused by induction. He stated that he had inquired of the railroads along which he had constructed telegraph lines to know if the induction from the telegraph wires interfered in any way with the operation of their signal wires and that in every case he had been informed that there was no such interference.

He further testified that within the past fifteen years he has constructed and reconstructed all the telegraph lines on the Chicago Great Western road from Chicago to St. Paul and Kansas City, and that since such construction the railroad has installed signal wires on this same line of poles between Forest Home and Galena Junction, Illinois, a distance of 148 miles, and from Dubuque to Oelwin, a distance of 74 miles, and from Randolph to St. Paul, a distance of 33 miles. That the signal wires are attached to the same poles as the telegraph wires and are strung from 12 inches to 4 feet distant from the telegraph wires. That he has never heard of any complaint in regard to interference with the signal system caused by induction from the wires of the telegraph company, although he has made inquiry. That he was informed by the railroad that they had never had any interference whatever with the signal service by reason of the telegraph wires being on the same poles with the signal wires. The witness was then asked the same hypothetical question asked the witness Tuttle and set forth in full in the testimony of the said Tuttle, to which this witness replied that in his opinion no interference by reason of induction would be caused by the existence of these conditions.

JOSEPH BEAUMONT, a witness on behalf of the complainant, testified that he is the Signal Engineer of the Chicago Great Western Railroad, a position which he has occupied for two years and four months. That prior to this employment he was employed by the

Panama Railroad as Superintendent of Telegraphs, Telephones, Signals, electric light and power, which position he held two years and two months. That prior to that time he had been employed by the Atlantic Coast lines as Supervisor of interlocking and in general charge of signal construction work and also by the General Railway Signal Company of Rochester, New York, as Assistant Engineer of sales and installations, in general charge of sales and installations under the General Manager. That he has had experience in the operation and installation and operation by electricity of railroad signal systems for about fourteen years. That in addition to this practical experience, he has been a student of the theory of electricity for the past sixteen years. That he has written and published pamphlets or treatises on the operation of railway signal systems which are recognized as standard articles on the subjects therein treated, consisting of instruction books for railway signal departments, advertising pamphlets for railway signal companies and articles in technical magazines, such as the *Railway Gazette* and the *Signal Engineer*. That he considers himself familiar with the science of electricity as applied to the operation and maintenance of railway signal systems in general. He further testified that the Chicago Great Western Railroad Company has a railroad signal system upon its right of way covering about 1500 miles. That about 350 miles of this signal system are electric signals, known as automatic block signals. That he is familiar with the auto-

matic block signals used by the Southern Pacific Company and that the system used by the Southern Pacific Company and by the Chicago Great Western Railroad Company is practically the same excepting only that the apparatus is manufactured by a different company. He testified that there is a telegraph line maintained upon the right of way of the Chicago Great Western Railroad and that the telegraph wires and the signal wires are maintained on the same pole line for a distance of 245 miles between Chicago and Oelwin, and for 33 miles, between St. Paul and Randolph. That the telegraph wires and the signal wires are not on the same cross-arm, but are on the same pole line from 12 inches to 4 feet apart. That these conditions have existed here for ten months and that during that time the railroad company has experienced no interference with the operation of its signal system by induction from the telegraph line, and that there is no danger of such interference. The witness was then asked substantially the same hypothetical question as that asked of the witnesses Tuttle and Baker, to which he gave the same reply.

JOHN O. STEVENS, a witness on behalf of the complainant, testified that he was Secretary of Pacific Postal Telegraph-Cable Company, a New York corporation, in the year 1903. He identified a deed dated December 9, 1903, from Pacific Postal Telegraph-Cable Company of New York to Postal Telegraph-Cable Company, an Oregon corporation, to which his

signature was attached as Secretary, and to which was attached the seal of the Pacific Postal Telegraph-Cable Company, and which was signed by W. H. Baker, who was Vice-President of the Pacific Postal Telegraph-Cable Company in the year 1903. This deed was offered in evidence and objected to as being incompetent, irrelevant and immaterial, and was marked in evidence "Plaintiff's Exhibit 18." On cross-examination the witness testified that he kept the minute books of the Pacific Postal Telegraph-Cable Company and did not know whether any resolution expressly authorizing the execution of this deed was passed.

DONALD McNICOL, a witness on behalf of the complainant, testified that he was Assistant to the Division Electrical Engineer of the Postal Telegraph Company, a position which he had occupied for about 2 years, and that his duties consisted of assisting the division engineer with electrical matters, principally pertaining to the operation of telegraph circuits, quadruplex circuits, telephone circuits and the equipping of offices with electrical apparatus. That he had occupied the position of Manager of a telegraph office and had been in the telegraph department of various railroad companies—the Canadian Pacific Railway, the Soo line, and the Northern Pacific. That his duties and employment had brought him in contact with the science of electricity and that he had made constant study of the theoretical part of his work during the time he had been employed and after hours. That he had attended lec-

tures at the University of Minnesota, the University of Utah and Columbia University. That he considered himself familiar with the operation by electricity of railroad signal systems and also telegraph lines. He was then asked the question: "In your opinion would any disturbance occur from induction where the usual railroad signal system and the ordinary commercial telegraph lines are separated at all points by 12 inches of air?" To this question objection was made on the ground that there is a lack of necessary parties defendant; that the bill of complaint fails to state facts constituting a cause of action either in equity or law, and that the testimony is incompetent, irrelevant and immaterial. To this question the witness answered: "It is my belief there would be no disturbance." The witness testified, subject to the same objections, that he had made examinations and measurements as to physical conditions on the lines of the Pennsylvania Railroad, the Erie Railroad, the New York Central Railroad and the Lackawanna in the month of January, 1912. That these investigations were made in the general vicinity of New York City, but beyond the yard limits, so that the conditions investigated would be main line conditions. That he has memoranda and other data of the investigations made by him and referring to such memoranda and subject to the same objections he testified that he found on the Pennsylvania Railroad, both on the main line and the branches, that there were signal wires and telegraph wires carried on the same pole lines. The

main line instruments in the signal circuits, that is the rails, operate on practically the same amount of current as the telegraph instruments operate on. The signal wires are carried on the bottom cross-arms. On this cross-arm also are carried 2 425-volt voltage battery charging wires, a voltage 10% higher than the maximum voltage carried in the telegraph wires, and that this voltage was used for storage battery charging purposes for the signal service. He further testified, subject to the same objections by Mr. Burleigh, that the telegraph wires and the signal wires on the Pennsylvania Railroad were 2 feet apart, and that the telegraph wires varied from 1 to 4 feet in distance from the battery charging wires. That these distances apply to wires separated on the cross-arms, and that they are not separated by air. That the signal wires and the telegraph wires are on the same cross-arm. The witness further explained that there is a distance of 1 foot between the signal charging wire and the telegraph wire, this distance being measured along the cross-arm upon which both wires are strung, and which furnishes a physical connection between these wires. He differentiates these from the signal wires described because the railroad semaphores are operated on low voltage on account of the currents being carried in the track rails, but the current is furnished to these semaphores and other apparatus by wires carried along the pole line from the charging station, and that charging wire carries a comparatively high voltage to charge the station batteries

located in the base of the semaphores. It simply means that 425-volt wire gives all the power along the railroad on the telegraph poles where there are telegraph wires and telephone wires, and terminates at a semaphore, where it charges the storage battery. That these high voltage wires vary from 1 to 4 feet from the operating wires, and that in some instances they are on the same cross-arms. That in addition, the signal wires are on the same poles and in some instances on the same cross-arms, and that these so-called signal wires varied in distance from 1 to 4 feet from the telegraph wires on the Pennsylvania Railroad, being in some instances on the same cross-arms and in other cases carried on what are known as bracket pins. That these conditions occur generally on the Pennsylvania system.

The witness then testified, over the same objection on the part of the defendant, in regard to the conditions existing on the Erie Railroad. His testimony tended to show that the Erie Railroad Company carries both signal wires and telegraph wires on the same pole line. That the signal wire instruments are operated on practically the same current voltage as the telegraph instruments are operated on. That on the cross-arms 550-volt battery charging wires are placed, the distance between the signal wires and the telegraph wires varying from 12 inches to 3 feet. That specifically these conditions exist just west of Passaic, New Jersey, the minimum distance between the telegraph wires and the 550-volt charging wire being 12 inches, and from that

to 3 feet, and the distance between the signal wires and the telegraph wires being 2 feet. That in some instances the telegraph wires and signal wires were on the same cross-arms, but the minimum distance would be between the cross-arm carrying the signal wires and the arm above, which would be a shorter distance than if they were on the same arm. That in some instances the telegraph wires and the storage battery wires were on the same cross-arm. That in the instances investigated on the Erie Railroad, the three classes of wires—telegraph wires, storage battery charging wires, and signal wires—were attached to the same pole line. That the Erie uses the signal system manufactured by the General Railway Signal Company.

Over the same objection on behalf of the defendant, the witness testified in connection with the conditions on the New York Central Railway, as follows: That he had made an examination of the New York Central lines and on this road they have telegraph, telephone and signal wires on the same pole line. The signal wires are operated on low voltage, as is customary. Two signal wires are used 16 inches apart, and 12 inches from each of these signal wires is located a 600-volt storage battery charging wire. The distance between the charging wires and the telegraph wires is 48 inches and the distance between the signal wires and the telegraph wires is 48 inches. In some cases the telegraph wires and the signal wires are on the same cross-arm and in some instances the charging wires and the telegraph wires are on the same cross-arm.

Testifying in regard to conditions on the Delaware & Lackawanna Railroad, over the same objection on behalf of the defendant, the witness said that the Lackawanna carries signal and telegraph wires on the same pole line, the signal system being that manufactured by the General Railway Signal Company and operating on 50 milliamperes of current, or practically the same as used for telegraph purposes. The distances between signal wires and telegraph wires is 2 feet. On the same cross-arm that carries the signal wires proper there are two storage battery charging wires with a potential of 550 volts. That in some instances the telegraph wires and the signal wires are on the same cross-arms and in some instances the telegraph wires and the signal charging wires are on the same cross-arms.

The witness testified that he had been employed in the office of the Superintendent of Telegraph of the Northern Pacific Railroad at St. Paul and that his employment there brought him in contact with the operation of the signal system on that railroad. That he was so employed for about four years and that he never knew of a case of interference with the operation of the signal system on the Northern Pacific by induction from the telegraph wires, although his employment would have caused him to know of such interference if any had taken place. The witness was then asked substantially the same hypothetical question as that asked of the witness, Harry A. Tuttle, and hereinbefore set forth in full. And over the objection of the

defendant testified in reply that in his opinion there would be no interference under the conditions outlined.

D. McREYNOLDS, a witness on behalf of the complainant, testified as follows: That he is General Foreman of the Mackay Telegraph-Cable Company, one of the companies connected with the Postal Telegraph-Cable Company. That he is engaged in constructing and reconstructing telegraph lines in Arkansas and Texas. That he has been connected with construction work in the capacity of General Foreman for about 20 years and took charge of the construction work from Wichita, Kansas, to Galveston, Texas, about 1910. That he has had about 25 years' experience in construction work with the Western Union, the Postal and the Southwestern Telegraph & Telephone Company, and has worked in all parts of the United States. That he has been engaged in construction work along the lines of railroad of the Atchison, Topeka & Santa Fe, the Chicago & Great Western, the Chicago & Alton, the Missouri Pacific system, and others, and in the course of his work he has had occasion to observe the manner of construction and maintaining telegraph wires, and of railroad signal wires. That he constructed the block signal pole line and strung the wires for the Union Pacific from Columbus, Nebraska, west to Green River, Wyoming, and from Julesberg, Colorado, to Denver, in 1907 and 1908. He further testified that there are numerous places along the lines where the ends of the cross-arms of the Postal Telegraph-Cable Company's

lines and the cross-arms of the railroad signal wires are within 2 to 4 feet of each other. At other points the distances are somewhat wider, depending on the width of the right of way and the engineering of the lines. The witness testified that in his opinion and as a result of his theoretical and practical experience, there would be no disturbance or hindrance from induction where the usual railroad block signal system and the ordinary commercial telegraph lines are separated at all points by 12 inches of air, and that no disturbance from induction where there was a separation of 12 inches of air between such signal and telegraph lines has occurred within the experience of the witness. He further testified that he observed the operation of the signal system on the Union Pacific, constructed by him, and that although within a few feet of the telegraph lines, it operated satisfactorily, and there were no disturbances caused by too close contact with the telegraph wires.

He further testified that he made investigations in 1912 on the lines of the Rock Island near Dallas and on the Texas & New Orleans, near Houston, and on the Louisiana & Western Railway in Louisiana, and on the Morgan, Louisiana & Texas Railway in Louisiana; the St. Louis, Iron Mountain & Southern in Arkansas; the Illinois Central Railway in Tennessee, and on the Texas & Pacific Railway between Dallas and Ft. Worth, Texas, with a view to determining outside of yard limits the distances apart of pole lines and cross-

arms and telegraph and signal wires. That at some of the points where examinations were made by him the signal wires were located on the same pole line as the telegraph wires. That with reference to the Rock Island Railway his investigations covered the greater portion of the mileage between Ft. Worth and Dallas, Texas. He testified that the railroad block signal wires and the commercial telegraph wires of the Western Union Telegraph Company are carried on the same pole line on different cross-arms, the wires being approximately 4 feet apart. That the two systems of wires operate perfectly under those conditions. The Western Union has three circuits part of the way, and four circuits part of the way.

With reference to the Texas & New Orleans Railroad he testified that his examination was from a point about 7 miles east of Houston to a point near Crosby, Texas. That along the greater portion of this track there existed a combination pole line used by the Postal Telegraph-Cable Company of Texas on top gain, the Southwestern Telegraph & Telephone Company on lower gain, distant about 24 inches. The railway block signal line has a separate pole line. At one point measured by the witness the distance from end to end of the cross-arms was 5 feet. At another point there were three lines of poles on the north side of the track, the South Texas Telephone Company, the Postal Telegraph-Cable Company of Texas and the railway block signal line. At one point the distance apart of the ends of the cross-

arms on two of these pole lines was 2 feet.

Referring to measurements made along the line of the Louisiana & Western Railway, the witness testified that his measurements began near Jennings, Louisiana, and ran to Midland, Louisiana. That there is maintained on the north side of the track a railroad block signal pole line and also a line of the Postal Telegraph-Cable Company of Texas. That the distance between the ends of the cross-arms of these pole lines is 4 or 5 feet except on certain curves, where the cross-arms range from 1 to 2 feet apart.

Referring to the Morgan, Louisiana & Texas Railway he testified that his examination covered from Bayou Salle, Louisiana, to near Burwick, Louisiana. That the block signal wires along that railway are on the same pole line as the Western Union Telegraph commercial lines. That the Western Union has three cross-arms on the pole line. That the block signal wires are on the fourth cross-arm and are 2 feet distant from the Western Union wires. At other points there are three lines of poles, namely: the Postal Telegraph-Cable Company poles, the block signal poles and the Western Union. That from a point near Desmondes, Louisiana, to a stretch in the block signal system, the wires are on the Western Union pole lines and there is a distance of 2 feet between the lines.

Referring to the measurments made on the St. Louis, Iron Mountain & Southern Railway, the witness testi-

fied that near Pine Bluff, Arkansas, the pole lines of the telephone and telegraph companies have their cross-arms within one foot of each other at certain points.

Referring to the Illinois Central Railroad, the witness testified that from a point near Memphis, Tennessee, to Woodstock there is a pole line of the Postal Telegraph-Cable Company on the west side of the track. That this line also carried block signal system wires, the distance from the telegraph wires to the signal wires being 2 feet. At a point near Tipton the clearance between the pole lines of the telephone company and the pole line of the Postal Company, which carries the signal wires, is 5 feet, the signal wires being 2 feet from the Postal wires.

Referring to the Texas & Pacific Railway, the witness testified that his measurements were made on this road between Dallas and Ft. Worth. That on the right of way there is a pole line of the Postal Telegraph-Cable Company and also one of the Southwestern Telegraph & Telephone Company. That the clearance between the cross-arms is 15 feet.

He testified that within his observation there had been no electrical disturbance from induction occurring by reason of the location of the lines, and that the lines worked perfectly. That the block signal lines required for their operation a substantially heavy voltage. That such block signal lines are maintained on each of the railroads referred to. That the charging wires used

along such block signal lines are uninsulated and that the telegraph and telephone wires are also uninsulated. That in some instances telegraph and signal wires were located on the same cross-arms and in such cases they were usually from 2 to 4 feet from the block signal wires. That the railroad rights of way covered by this testimony were from 60 to 100 feet in width. The witness was then asked substantially the same hypothetical question set forth in full in the testimony of Harry A. Tuttle, to which he answered that under the conditions outlined there would be no interference.

WRIGHT M. SMITH, a witness on behalf of the complainant, testified that he is Right of Way Agent for the Mackay Telegraph & Cable Company, and has been in the telegraph service about 21 years as a telegraph operator, Manager of local office, and Right of Way Agent. That for about ten years he has been in the Right of Way Department and has observed the method of construction and relative location of telegraph and telephone wires and railroad block signal wires all over the Middle West, from Chicago west as far as San Francisco, and south and east of the Pennsylvania State line. That he is familiar with the method of construction of railroad block signals, and with the method of construction of commercial telegraph lines and telephone lines. That he made observations, examinations and measurements as to the physical conditions of block signal lines and telegraph lines on certain railroads during the year 1912, such measure-

ments being made on the Chicago & Great Western Railroad, near Chicago; the Atchison, Topeka & Santa Fe, near Coal City, Illinois; the Monon Railroad, near South Hammond, Indiana; the Chicago & Alton Railway at different points in Illinois, and on the Pennsylvania Railway in Indiana. That these measurements were made outside of the yard limits.

Taking up in order the conditions existing on these different railroads the witness testified as follows:

That on the Chicago & Great Western Railway there is one pole line. That the North American Telegraph Company uses the two upper arms, the next cross-arm is vacant, the Postal Telegraph-Cable Company uses the next three arms, the Chicago & Great Western Railway Company has the next two arms for block signal wires and telegraph wires. The signal wires are 2 feet from the telephone and telegraph wires.

On the Atchison, Topeka & Santa Fe Railway at Cole City, Illinois, the Western Union Telegraph Company has a 25-foot pole line on which it carries 16 wires, and the block signal wires of the railroad company are strung on brackets 2 feet below the Western Union wires on the same pole. Ten feet and six inches from the Western Union wires the American Telegraph & Telephone Company has a 30-foot pole line carrying 10 wires. Thus the American Telegraph & Telephone Company's line overhangs the pole line which carries the telegraph and block signal wires.

On the Monon Railway, the Western Union has a 25-foot pole line carrying 7 wires. The railway signal wires are on a cross-arm 2 feet below the Western Union wires.

On the Chicago & Alton Railroad near Mitchell, Illinois, the Western Union Telegraph Company has a 30-foot pole line carrying 43 wires, and the railway block signal wires are on the same pole line 2 feet below the telegraph wires. At Godfrey, Illinois, the Western Union has a 30-foot pole line carrying 15 wires, and the Chicago & Alton has its block signal wires on cross-arms 2 feet below the Western Union wires. At Millwood, Illinois, the Western Union Company has a 25-foot pole line carrying 15 wires, and the Chicago & Alton block signal system wires are on a cross-arm 2 feet below the Western Union wires. At McLean, Illinois, the Western Union has a 25-foot line carrying 19 wires and the Chicago & Alton's block signal system wires there are on a cross-arm 2 feet below the Western Union wires. The American Telegraph & Telephone Company has a 25-foot pole line carrying 36 wires from 11 to 16 feet from the Western Union pole line, which carries the block signal system wires, making the cross-arms from 1 to 5 feet apart at various places.

On the Pennsylvania Railroad the Western Union has a 25-foot pole line carrying 24 wires and the automatic block signal wires are on a cross-arm on the same pole line 2 feet below the Western Union wires. Be-

tween Valparaiso and Wheeler, Indiana, the Western Union has 22 wires on its pole line and the automatic block signal wires are strung on a cross-arm 2 feet below the telegraph wires. On the Nickel Plate Railroad right of way, which parallels the Pennsylvania Railroad at this point, the Western Union Telegraph Company has another pole line which is from 11 to 20 feet from the pole line on the Pennsylvania right of way at various places, making the ends of the cross-arms of the two lines from 1 to 10 feet apart.

The witness further testified that charging wires in connection with the block signal lines are maintained on the same pole lines as the signal wires, and that the air clearance between the charging wires and the telegraph wires is from 2 to 4 feet. The witness was then asked the same hypothetical question set forth in full in the testimony of Harry A. Tuttle, to which he replied that under the conditions outlined there would be no interference.

V. V. Stevenson, called as a witness on behalf of the complainant, testified that at the present time he is the division electrical engineer for the Pacific Postal Telegraph Company, and that his duties are in the Pacific division, and that he has been employed by the Postal Telegraph Company for about eight years, and has been in the electrical department about five years. That he was formerly an operator for the Postal Company, and was employed by the Western Union

Telegraph Company for about eleven years prior to that time. That he has made a special study of electricity from both a practical and theoretical standpoint. Counsel for complainant being about to qualify Mr. Stevenson as an expert, counsel for defendants admitted his competency. The witness testified that he is familiar with this line of telegraph from New Era to Eugene and south to the Oregon and California state line, and that this familiarity has extended over the period of two years and a half. That he has been over the line and made measurements to ascertain how near the telegraph line of the Postal Telegraph Company the signal wires erected upon the right of way are stretched. He testified that at one place near New Era the separation between the Postal wires and the signal wires varies from two feet to ten feet for about five spans; that would be about six or seven hundred feet, and that at other points the distance varies from ten feet to forty feet. That the witness had never had any complaints from the Southern Pacific Company to the effect that the telegraph lines were interfering with the working of the signal system, and that he knows the points along the Southern Pacific Railroad where the telegraph wires and the signal wires are upon the same line of poles, and one such point is near Army Point, in California, where the signal wires are on the same pole line with the Postal wires; in fact, are on the Postal pole line for a distance of about six or seven spans, that is, about one-third of a mile, and that no

complaint to the effect that the telegraph line was interfering with the signal wires has been received, and that the signal wires have never interfered with the operation of the telegraph wires. The witness then testified that there could be absolutely no interference between the telegraph wires and the signal wires, one with the other, if there is a separation between them of twelve inches of air. He explained that this separation is so great as regards the exposure that there could not possibly be enough induced current from the telegraph line entering the signal wires to operate the signal relays, taking into consideration the voltage carried by the telegraph wires, which does not exceed 375 volts. Nor can the signal wires interfere with the telegraph wires under those circumstances. He further stated that such wires may be placed a foot apart with impunity, so far as danger of interference is concerned; that he thinks the Southern Pacific Company has operated its block signal system for about four or five years in that section, and knows of several places in California where wires of the Southern Pacific block signal system are on the same poles with the wires of the telegraph companies, and that there are places in California and in Oregon where the telegraph wires and the signal wires come within a few feet of each other, but there has never been any complaint made that the telegraph wires interfere in any way with the signal system, and that it is absolutely impossible where such wires are from ten to fifteen feet distant that there could be any difficulty whatever.

On examination by the court, the witness stated that the signal wires carry the following voltages, to wit:

Track circuits are operated on one volt not to exceed two volts, and the line circuits on about 8 volts, storage battery.

A. M. McKEEN, a witness on behalf of the defendants, testified as follows:

That he was the Signal Engineer of the O. R. & N. Company and the Southern Pacific Company lines in Oregon, and had been such with the Southern Pacific lines in Oregon nearly 4 years. That he had had about 14 years' experience as a signal engineer, 4 years of which had been with the Oregon-Washington R. R. & Nav. Company and the Southern Pacific Company on the Oregon lines, and previous to that time he was with the Southern Pacific Company for a period of about 10 years. That as Signal Engineer he had charge of the construction and operation and maintenance of automatic block signals and electric interlocking plants, and all matters pertaining to signals. That in the performance of his duties as Signal Engineer he was acquainted with and had knowledge of electrical currents and the operation and effect of electrical currents upon telegraph wires, block signal systems and things of that kind, his knowledge being both theoretical and practical. That he kept in touch with the annual meetings of Signal Engineers of various railroads of the United States.

The witness further testified that the Southern Pacific Company or the system of which it is a part, began the installation of the block signal system about 20 years ago, and that they began the installation of the system that is now in effect for 71 miles upon the right of way of the Oregon & California Railroad Company between Portland and the Oregon-California state line about 20 years ago, and since that time considerable improvement has been made in the apparatus. That he has had some experience in the operation of trains in connection with the block signal system and that this block signal system that has been partly installed by the Southern Pacific Company lines in Oregon on the particular right of way referred to, was regarded by the witness and by railroad operators as a reasonably necessary improvement and appliance for the safe operation of trains. That an automatic block system is a series of consecutive blocks. The use of the blocks by trains is controlled by block signals which are set up at the entrance of each block. These block signals on single track and on double track both, are located on the right hand side of the track, as viewed from an approaching train. The block signals consist of the standard post about 26 feet high, with an arm extending to the right, which is painted red. This arm, when extending out in a horizontal position, indicates danger or a train in the block, a broken rail, a switch misplaced or left open, a car outside of clearance on a side track, or any other condition which makes the use of

the block unsafe by trains. The semaphore arm is a day indication, that is, the position of the arm governs the trains, the horizontal position being the danger position and the inclined position of the arm downward at an angle of 45° indicates clear. When the arm is horizontal at night, in addition a red light is shown, which indicates danger, and when the arm is inclined down, indicating clear, a green light is shown, which is our standard indication for "proceed." The witness testified that in these block signal systems the signals are controlled by track circuits, by line circuits and by motor circuits, there being three separate and distinct circuits. The track circuits consists of a battery connected to the track at one end of the block and a track relay connected at the other end of the block, the current flowing through the track rails. This circuit connects with the relay and through the contact points of this relay with the overhead line circuit, which is run on the poles referred to as our block system poles on the side of the track. These overhead line wires loop through or are controlled by the track relays so that in case a train is on the block, the rails of the track are short circuited or shunted and the current, instead of going through the track relay, will go through the wheels of the train or locomotive or car and open the overhead line circuit, which deprives the signal apparatus of the current which holds it in a clear position. It then returns to the danger position by gravity by a weight which is attached to the spectacle casting or

the semaphore arm. The track relay consists of a pair of coils wound around an iron core, which is simply a round piece of iron. The wires wrapped around that and the ends of the two coils are connected at the track rails so that the current which comes from this battery at the opposite end of the track from the relay energizes this relay. That is to say, the current passes through the coils and sets up magnetism in this iron core in the center of the coil. That little iron core when it is magnetized will draw up a little armature. That the operation of magnetizing the coil is not from induction, but it is effected by the current which comes from the track battery, which is located at the opposite end of the block from a relay. That when this relay is energized by the current going through it from this track battery, it holds this little armature in closed position, closing the contact just as we push a button to ring a door bell, and holds it closed and consequently holds closed also the signal circuit which operates the semaphore signal. When a train enters the block circuit it deprives this relay of the current which goes through it normally. The current instead of going through the relay when there is a train in the block, will simply pass around through the wheels of the train from one track to the other, necessarily taking the current away from the track relay, which, as we term it, de-energizes it. It takes away the current and thereby takes away the magnetism and allows the little armature to drop down and break the circuit in the overhead line wire; that is, the

circuit controlling the signal. It breaks that at the relay and that deprives the signal of its current and allows it to go to danger by gravity by its weight. That the height of these standards in which these danger signals and semaphores are placed is 26 feet from the base of the rails up to the highest point. That the standard method of locating them is 7 feet from the nearest rail. That in a case where there is a side track or a double track in the block, or more than one track, the standards are connected with side tracks up to the clearance point; that is, to a point where a car would be outside of contact from the main line. That it was the practice to extend the circuits up to what is called the fouling point, so that in case a car or an engine were out on the side track, if it were to get down to a point where it would strike anything standing on the main line, it would hold the signal in a danger position. That the length of these blocks is determined wholly by local conditions, such as conditions of traffic and the distance between stations, etc., averaging about a mile apart. That the block signals are a mile apart but the block signal controls more than one block. That the signals control the length of the block and what is called an overlap, which is a device to prevent two trains coming in opposing directions from passing. If a train were to enter one end of the block at the same instant that a train were to enter the other end, both trains passing the signals governing them at the same instant, they would probably meet in the block; that is, they would

come together in collision, provided they were on the same track. The collision of trains is avoided by overlapping; that is, we let the signal control not only up to the next signal, but to a point beyond that, which is called an overlap. Thus a train coming in one direction will set the signal before it enters the block, and in that way any possibility of a collision is avoided.

That it is more difficult to operate the block signal system on a single track line railroad than where there are two independent double tracks, for the reason that it is necessary to protect not only against fouling traffic, such as is done on the double track, but also to protect against opposing traffic; that is, it is necessary to protect in both directions. On a double track it is simply a matter of locating the signals so far apart in accordance with traffic conditions and the number of trains running, spacing them so far apart and protecting only against a fouling movement. On a double track the movement is only in one direction. On a single track it is necessary to protect against opposing trains, and for that reason it is necessary to put up signals connected with the one track for both directions, which brings in a complication of overhead wires and relays, apparatus, etc. That overhead wires strung on poles are used for the purpose of operating block signals, the signal line circuits being controlled through the medium of the track circuits and the line circuits, carried on poles adjacent to the track. That these poles are almost always placed on the opposite side from the pole line

carrying the telegraph wires, in order to avoid any trouble from poles falling down or induction caused by these telegraph wires. That there are three separate and distinct circuits, the track circuit, the overhead line circuit, and the motor circuit, the motor circuit being the signal circuit. On the track circuit a gravity battery of one volt is used which operates the track relay. On the overhead line circuits a storage battery is used, the voltage required depending on the length of the circuit. It ranges between 2 and 8 volts. On the motor circuit controlling the signal, and which is purely a local circuit within the signal, 8 volts are used, the maximum being 8 volts and the minimum one volt. That these overhead wires run continuously through the block signal territory. That the poles which carry the overhead wires that are used to carry the overhead current, are spaced from 30 to 40 to the mile, according to conditions. That the distance between the poles is about 130 feet. The poles of the Postal and the Western Union average from 35 to 40 to the mile, and the poles of the block signal system vary from 30 to 40. The line used on the block signal system is considerably lighter than the Postal Telegraph or the Western Union, and not as many wires are carried on it. The poles of the block signal system in the 71 miles that have been constructed that carry these overhead wires are located on the opposite side of the track from the Western Union poles, and wherever possible are located 40 feet from the track, although that is not always the

case on the Southern Pacific. The standard specifications call for 40 feet from the nearest rail. These specifications were obtained after a great many years of experience with having the wires of the block signal system located on the same side of the track with the telegraph wires, and in some cases on the same poles carrying other wires, and as a result of the trouble experienced from these causes the matter was brought very forcibly to our attention and after a great deal of talk on the subject it was determined to obtain a separate pole line for carrying the wires of the block signal system. This was at a great increase in cost over our old method, but we figured that we were more than justified in going to the increased expense. That specifications were adopted April 18, 1908, by the General Managers. That they were proposed by the Signal Engineers of the Harriman Lines and were recommended for adoption by them and were adopted by the General Managers of all the associated Harriman Lines. That there are five General Managers and five Signal Engineers. That these specifications were followed in the installation of the 71 miles already installed and are to govern the witness in the further installation for which he had made requisition. That he had made requisition for 100 miles in 1909.

The witness further testified that the matter of the location of poles with reference to the track is one that had been brought very forcibly to the attention of the Signal Engineers by the operating department. That

so much trouble had been caused in the past by poles falling down and getting across the tracks and wires falling down and pulling brakemen off the top of the cars or injuring them, that it was thought necessary to make specifications providing that the poles should not set closer than 40 feet to the main line rail wherever possible, in order to avoid the poles going down and causing probably a derailment of the train or accidents of some kind which have happened quite frequently. That in the opinion of the witness, two lines—one with its poles for 6 wires and more for telegraph purposes, and the other consisting of the poles and overhead wires and appliances of the block signal system on a right of way varying from 30 feet to 200 feet between the side boundary limits of the City of Portland and the California State line—could not be safely or practically installed for the entire mileage. That where the right of way is narrow it would be impracticable to operate a block system with the poles and wires of the Pacific Postal Telegraph-Cable Company on the right of way where they would be in close proximity to the block signal wires. That there are several places where the Postal wires are close to the wires of the block system, but the witness knew of no place where they were as close as 2 inches. That there are several places where they are probably closer than a foot, and in these places the right of way is very narrow, indeed. That at the time the signals were installed the witness took up the matter with the Chief Engineer of his company and re-

quested him to have the wires of the Postal Telegraph Company moved to a point where they would not interfere with the working of the block signal circuits; in other words, move them off the right of way so that there would be no trouble because of interference between their wires and ours. The witness further testified that in April, 1907, shortly before the time they started to install their block signals, he made complaints to the Postal Telegraph Company that the poles of that company being on the right of way at certain points where the right of way was narrow, materially interfered with the construction of the block signal poles and wires. That it was necessary that the Postal Telegraph Company should remove their poles and wires from the point where the witness wished to install the block signal system with the overhead wires, for the reason in the first place that there was not room enough, and for the further reason that there would be too much danger of the block signal wires interfering with the Postal Companys' wires or vice versa, and because of interruptions in the telegraph circuits, and also interruptions in the block signal circuits. That usually the voltage of the wires of the Pacific Postal Company or any other telegraph company operating wires for commercial purposes is from about 110 to 375 or possibly 400 volts. That the voltage at the present time of the overhead wire of the block signal system is from 2 to 8 volts.

The witness further testified that in his opinion, from his knowledge and experience, there would be some dis-

turbance or interference with the block signal overhead wires and the operation of the block signal system by the active presence of wires of the Pacific Postal or any other telegraph company carrying the voltages that the witness had said they do carry, and that such trouble had occurred before, it being due to induction from telegraph and other wires which are in close proximity to the block signal wires. That the wires of the block signal system overhead and the apparatus operated by them since the installation have been affected so as to prevent their complete operation during the time they have been installed. That such interruptions have occurred on account of induction from the telegraph wires of the Pacific Postal Telegraph-Cable Company. That this induction affects the block signal system in the following manner: The induction from the telegraph wires enters the wires of the block signal system. The cause of induction is a magnetic field which exists around a wire carrying the current, and any other wire being in this magnetic field will be impressed or will also contain electricity. Therefore, a wire that is in any other magnetic field, a magnetic field created by a wire carrying current, will receive an induced charge of current from that other wire. This induced current has had the effect on several occasions of working our apparatus. Our signal relays are necessarily a very delicately constructed piece of apparatus and an induced charge from a highly charged wire which is in close proximity to our signal wires would have the effect

of holding that relay closed, possibly with a train in the block. It can readily be understood what the conditions would be when a signal would indicate clear if there were a train in the block. It would be a direct invitation to the engineer to run into the block and possibly collide with another train. That the approaching train that might be in the block would not necessarily be within sight of the approaching train that would be entering the block, thus showing a clear side, it depending, of course, on the character of the track whether the curvature or any other object would hide the train from view. That the blocks are a mile or more in length, depending upon topography, curvature, etc., so that a train coming from the south on this line might be inside of a block and yet a mile away from an approaching train, and if there were disturbance of the semaphore by reason of anything indicated by the witness, the engineers of both trains concerned would be deceived and neither would have knowledge of the other train's presence in the block because each train would have received a clear signal and, of course, each would naturally have supposed that the block would be clear. Under some conditions it is true that when there is a disturbance of the operation of the wires of the block signal system by induction or otherwise, the signals will show danger, and the trainmen approaching the block will be warned, and that the only disturbance would be to stop. Our automatic block signal is constructed on the lines that will prevent the signal

giving a clear indication when the block is occupied through a failure of any part of the apparatus from breaking, but when a foreign current is supplied to our signal circuits there is danger of the signal indicating clear when unsafe conditions might exist within the block. And that has been verified in actual cases in the experience of the witness in the past year and a half in the operation of this block signal system. It has been done several times. This condition makes possible a collision within the block with disastrous results, of course. That a train passing through the block when it approaches a standard and sees a sign and sees that it is clear, does not stop or check its speed. When the block indicates clear it indicates to the train that there is a full block to run without getting into any kind of trouble whatever, that is from a track being obstructed. That, in the opinion of the witness, it is necessary that these poles and wires for the block signal overhead current should be on the opposite side of the right of way from the telegraph line that might be there. That that was the idea followed out in the last 7 or 8 years of our construction. We always maintain one side of the track for our line and allow the Western Union the other. Wherever the Western Union crosses over to the opposite side where they are already installed, we are in the habit of crossing back to the other side, so that in all cases we are on the opposite side of the track from the Western Union.

That if the block system wires were crossed with

other wires carrying a voltage of from 130 up to the maximum of 400 for commercial purposes, several results might follow. It might result in blowing out a fuse. A fuse is a safety valve in a circuit which provides for taking care of any excessive amount of current, and will blow the fuse out before it will destroy any other part of our apparatus. It might have the effect of blowing out a fuse, thus opening the signal circuit, and thereby holding the signal at danger against a train. Or it might have the effect of supplying current to the circuit and holding the signal clear or in the "proceed" position with the train in the block. That different results would be had in different cases. That that is the reason why the overhead wires on the block signal system are located on the opposite side of the track from the Western Union Company's wires. That the railroad required of other companies or persons desiring to cross the tracks with their wires, for protection to the block system, that they install their wires a certain height above the rails, 27 feet as a rule. If it is a telephone line, a farmers' telephone line, we endeavor to have them cross the track underneath by placing their wires in a conduit. If this is impossible, we make them place their wires at such a height that they will not interfere with the amount of traffic, so that it will not be low enough to pull a brakeman off a car. That in all cases these telephone wires crossing the right of way are not required to be placed above overhead wires of the block signal system, that depend-

ing entirely on conditions. If at the point where the line crosses the track the block signal system wires are high enough to permit the crossing wires to go over the block signal wires and still clear the track 27 feet, we then permit them to go over our wires in the air. In all cases, however, where they can not go over our wires and still clear the track 27 feet, we require them to put up protection guards to protect our wires in case they should fall down on top of them, and if we can not compel them to do it, we do it ourselves at our own expense. That there would be danger by reason of these overhead crossing wires of the telegraph company notwithstanding they are 27 feet above the track, on account of the possibility of poles going down or wires breaking during storms, which might have some effect on traffic, and probably hurt some of the employes of the railroad company, or passengers. That the existence of these track crossings adds an element of danger to the system and its operation, and in fact an effort is made to avoid track crossings wherever possible. That the telephone wires referred to as crossing overhead and crossing under in conduits are sometimes single wires and sometimes a metallic circuit consisting of two wires—sometimes a whole lead consisting of as many as 20 telephone and telegraph wires. That the wires of the telephone company as a rule cross the railroad track at county road crossings, but sometimes cross at private road crossings. That 71 miles of the line between Portland and the California State line is

equipped with block signals. That the cost of installing the block signal system is \$1,000 per track mile, meaning by this that on a single track it would be \$1,000 per mile, but on a double track it would be on a track mile basis. That the railroad company was installing the block signal system for a single main track with sidings and turnouts and spurs. That those wires are never carried in cables except where the wires are brought from the pole line down to the signals. That the method of doing that is as follows: In order to maintain the pole line at a fixed distance from the track all the way along, pole lines are kept in the same relative position and connect the pole line wires with the instruments in the signal by means of a cable. This cable consists of a certain number of wires which are bunched together and wrapped around with a tape to protect them from the elements. It is simply a flexible conductor which connects our line of wires with the signal apparatus in the signal case. That it is no trouble for the block signal line to cross the track, but makes a small increased cost. That double cross-arms are put on and the poles made more secure. That it is necessary to pick out good strong poles for crossings and guy them more securely.

Upon being question by a juror the witness testified that in a part of the right of way where he had previously testified interference with the operation of the block signal system had been experienced from induction from the telegraph wires, the railroad company

would not transfer the Western Union telegraph wires to the same side of the track where the wires of the Pacific Postal Telegraph-Cable Company were located and run its block signal system wires on the side of the right of way where no other wires were located. He explained that there were only 4 or 5 poles of the block signal system close to the Postal Telegraph poles at this particular place.

That during the year 1908 the largest number of signal interruptions from any one cause was from broken or crossed line wires. There were 27 cases of signal interruption on the lines of the O. R. & N. and the Southern Pacific lines in Oregon, each of them resulting in the stopping of a train, either freight or passenger, and the necessary delay thereof by flagging the train through the block. In that connection the witness stated that when a block signal indicates danger or stop, the engineer is required to bring his train to a standstill at the signal and send his flagman, who is the head brakeman, to flag through the block. The brakeman must go clear through the block ahead of the train in order to locate any obstruction or any inequalities in the track that might exist and cause the signal to stand at the danger position. That whenever an interruption of that kind occurs it results in a delay to traffic.

The witness further testified that about one-half of the interruptions of signal service on the Southern Pa-

cific were to his own knowledge caused by trouble with the wires of the block signal system either by reason of being crossed by other wires or being knocked down by trees falling over them or breaking from storms, etc., and being interfered with by malicious persons shooting off insulators and shooting down wires, thereby crossing them. That the trouble is with the overhead wires chiefly. That fifty per cent of the trouble is due to interference with the overhead lines that are used in connection with the signal system. That on several occasions in the installation of the block signal system on the Southern Pacific right of way it was found necessary to order the Western Union Telegraph Company to move its wires wherever they interfered with the erection of the block signal system's poles or wires or semaphore masts. That this was necessary in some cases because there was not room enough to erect the block signal system poles between the track and the Western Union poles, and in such cases the Western Union was requested to move its poles further back. That in other cases where they were installing a new block system and the Western Union was on one side of the track for say 5 or 6 miles, and then jumped over on to the other side for 5 or 6 miles and then back again, they took the matter up with the Western Union people and had them move their poles so as to be on one side of the track for the entire distance. That that had been done on all reconstructed work. Wherever the work is reconstructed, it is the aim to stay on one side

of the track, so as to give the block system the free use of the other side of the track for its wires.

The witness further testified that as a rule telegraph block systems consist of a telegraph wire which runs on the telegraph poles and is devoted exclusively to block purposes, that is it is subdivided into stretches of wire from one station to another and the operator at each station spaces the trains from information conveyed to him from the operator at the other station on either side of him. In some cases, however, on other lines, particularly on the Eastern roads, they use what is called the Control Manual System, which consists of a telegraph wire for blocking purposes and a track circuit in addition, indicating to the signal man at each station whether the block is clear. The reason that system was installed was that a train might leave station "A" and proceed to station "B" but might not get there complete; that is, they might lose a car out of the train. They might break in two and leave part of their train on the block. The operator at Station "B," seeing the train going by, naturally would think it was all complete and would give the signal to station "A" after the train had passed, that the block was clear, whereas the detached portion of the train might still be within the block. Therefore, on some lines, they use what they call the Control Manual block, which consists of a track circuit between the stations, which indicates to the operator at either station whether the block is clear in there by means of this track circuit. That these block signal systems are called Manual blocks

because they are operated by human agency and differ from the system of the Southern Pacific lines in Oregon in that these systems about which the witness has just been testifying are simply telegraph systems, whereas, the system of the Southern Pacific Lines in Oregon is purely automatic and does not call on the human agency anywhere to operate it. The witness continued that the effect of telegraph wires on a block signal system similar to that testified to and known as the Control Manual system is practically negligible since there is no great interference on the part of one telegraph wire with another, whereas in the case of the block signal wires of the Southern Pacific lines in Oregon or any other similar signal wires carrying a low voltage and a constant current, the liability of interference would be considerable, not only with automatic block signals but with any other system using a constant current. Referring to the voltages carried on the different wires about which he had just testified, the witness said that the voltage carried on any telegraph line is usually dependent on the length of that line, inasmuch as it must be varied to overcome the resistance of the instruments which are cut in on the line. The more instruments cut in, the higher voltage is required to work the line. Short lines can be operated on a voltage as low as 40 or 50 volts, or possibly lower.

The difference in the voltage of the telegraph lines would cause different effects upon the block signal system wires. The higher the voltage the more the in-

duction; that is, the greater distance the lines of magnetic force would travel around that wire; that is, the greater the distance the influence would be felt. This difference in voltage makes no particular difference in the operation of a telegraph system within reasonable margins. Telegraph wires as a rule are limited to a maximum of 400 volts.

The witness further testified that from his experience there is considerable danger of the effects of crosses caused by lines located along the railroad right of way picking up high tension currents and communicating that current to the apparatus or to the other wires necessary for the operation of the railroad. That there is a liability of telegraph wires, telephone wires or any other wires in the vicinity of the right of way becoming crossed up with high tension wires and communicating the same to telegraph wires or block signal systems in various ways. For instance, the telephone line might get down or a telegraph line might get down over a power wire. One end of it would be in contact with the power wire and the other end of it might come either in contact with the telegraph wire or possibly with a barbed wire fence, and at the same time possibly at some further distance down the road there might be another wire, for instance a telegraph wire, fall down and touch that same barbed wire fence, which would, of course, communicate the current from the power wire to the telegraph wire or to the block signal wires. That this, of course, is liable to happen and has hap-

pened on a great many occasions during storms. Speaking of the zone or area of electrical current influence, the witness testified that that would depend altogether on the voltage and would possibly be affected by weather conditions. That the higher the voltage the more numerous are the lines of magnetic force around the wire and the longer they will extend out in the atmosphere. That the right of way fences on the Southern Pacific lines in Oregon are posts set in the ground and spaced about 8 feet apart, to which are strung barb wire, the barb wires being separated between the posts by a little slat and stapled to the barb wire. That on a right of way from 30 to 200 feet in width, the guy wires that are required to be put in by a telegraph company interfere with the block signal system to the extent that on a narrow right of way it makes it impossible for the railroad to get the block signal wires in between the telegraph wires and the track. The witness stated that assuming there were 40 poles per mile it was his opinion that between Portland and the California-State line there would be an average of at least 8 guys per mile. That the manner of construction of these guys with reference to the poles that they support is as follows: They are fastened to a wooden stub which goes in the ground and which is located as a rule about 6 or 8 feet from the base of the pole and in a line crosswise of the track, that is, extending out to the side of the poles about 6 or 8 feet. That this manner of construction of the guys would interfere with the block signal system of poles and standards and overhead wires.

On cross-examination the witness testified that the apparatus used in the block signal system was manufactured by the Union Switch & Signal Company. Testifying in regard to the zone of influence surrounding a telegraph wire operated with from 70 volts up to 375 volts, the witness said that owing to the effect of induction, he was of the opinion that it would not be safe to be closer with the block signal system wires to the telegraph wires than 12 or 15 feet in order to be entirely out of the zone of influence and free from the effects of the induced current. The witness further testified that the Southern Pacific lines in Oregon now have a block signal system line in some places close to the telegraph line of the Pacific Postal Telegraph-Cable Company in the 27 miles from the car shops in the City of Portland to Aurora, and that the block signal system works where it is within a foot of the telegraph lines. The witness explained that these places of proximity are for a very short distance, but there is induction in short distances and in spite of that fact the signals work just the same. The witness explained that the effects of induction are not felt to any great extent where one wire crosses over the other but are particularly felt where wires run for a long distance parallel to each other. The witness further explained that if the telegraph line of the Postal Telegraph Company was maintained where it now is there would be induction, but not so much as that which would occur in the event the new telegraph line was constructed about which his testimony had been given, stating that

the existing line of the Postal Telegraph Company only comes in on the right of way and only comes within a close distance of the signal wires of the Southern Pacific lines for very short stretches. That the 71 miles of block signal lines which had already been constructed are close to the existing telegraph line of the Postal Telegraph Company for short stretches only and that the 100 miles which the railroad intended to construct and for which estimates had been prepared would be about the same kind of construction.

The witness further testified that telegraph lines use a direct current and that a direct current does not cause the same amount of induction as an alternating current, but the current of a telegraph wire is not necessarily direct. It is an interrupted current. It is not an altering current but it is a current which is interrupted at each movement of the telegraph key which the operator makes in making his dots and dashes.

The witness testified of an instance where the automatic block signal had been caused to remain in a clear position with a train in the block at Oregon City through induction caused by the Western Union wires on account of the block signal wires paralleling them on the bluff. Through Oregon City the block signal wires parallel the Western Union wires for about one-half a mile and the witness was of the opinion that this condition constituted an element of danger to the block signal system.

On re-direct examination the witness testified that

the 71 miles of block signal system were placed at the following points on the right of way. The first installation is 29 miles from East Hawthorne Avenue in the City of Portland to a station called Hito near Woodburn, and that this is continuous. The next section is a stretch of $11\frac{1}{2}$ miles between Albany and Albany Junction. The next is a distance of 7 miles between Eugene and Goshen. The next is 6 miles from Cottage Grove to Walker. The next from Divide to Drain, a distance of 13 miles. In addition to the foregoing there are 11 protection signals at stations in the Cow Creek Canyon covering the approach to the stations.

V. V. Stevenson was then called as a witness for the complainant. He testified that he had examined the testimony of A. H. McKeen introduced by the defendants. His attention was then asked as to whether block signal wires of such a system as Mr. McKeen testified about run continuously through the block signal territory from one end of the system to the other, and if not, why. He testified that such wires did not run continuously through the block signal territory on account of the system itself, as used by the Southern Pacific Railroad. The particular wires, signal line wires, that are strung on the signal line poles, only run between certain block signal semaphores that they control—probably not to exceed the length of one or two blocks, where they have what they call the overlap system. That would mean not to exceed anywhere from a mile to say two and a half miles, depending on the character of the country. The reason

for that is that the extension of the signal wires throughout the entire system is unnecessary, as the line wires concerned only affect certain semaphores to which they are extended.

Regarding the type of line construction of signal wires such as there is upon the Southern Pacific, particularly along the line in controversy, compared with standard Postal Telegraph construction, the witness said, as a general thing, and as a fact, the signal line construction is much lighter than standard telegraph construction. The poles are lighter, smaller; the construction is lighter throughout; insulation is not so high as on standard telegraph lines.

Referring to Mr. McKeen's testimony that the voltage on the Postal Telegraph line was 400 volts, the witness testified that the voltage did not exceed 375 volts, and in fact on the line it drops down to probably not to exceed 325 or 350 volts.

Being asked whether there could possibly be any interruption to the signal service caused by induction from the Postal wires between New Era and Hito, the witness testified that there could be no induction in that section for the reason that the amount of power carried on the Postal lines is so small that it could not possibly create a magnetic field large enough or strong enough to induce any current in the signal lines. Under heavy voltages, heavier than carried by the Postal lines, there might be some slight current induced in the signal lines

in that section, but it would take four or five times as much power as we carry on our lines there to induce any current in the signal lines at all; and then it could only be detected by a very sensitive measuring apparatus.

His attention being called to the statement of Mr. McKeen that "When a foreign current is supplied to our signal circuits, there is danger of the signal indicating clear when unsafe conditions might exist within the block," the witness testified that this could not happen from induction from the Postal wires. If the telegraph voltages were high enough and the current strong enough, which they are not, to cause any induced current in the signal lines, it would be of momentary duration only, and would be what we call an alternating or a pulsating current and would not have that effect. The witness testified that when the block signal indicates "clear" that it does not mean that the track ahead is clear of all obstruction that might cause a wreck. It means that the track ahead is clear of a train or a car butting out into the main line that might engage a passing train, and it indicates in general that there is some electrical connection between the rails. If a tree would fall across the track, which might derail a train if a train ran into it, that would not affect the block signal system at all, unless it broke down the signal wires; or if a landslide crossed the track, that would not operate the block signal system.

He further testified that a practical demonstration would positively show that there would be no effect from

induction in that section between New Era and Eugene, and only under artificial and abnormal conditions would it be possible to even cross up the telegraph wires and the signal line wires in such a way as to bring the semaphore to the "clear" position.

He further testified that where the Postal Company crosses railroad tracks, and signal lines, it has a special and stronger method of construction. Heavier poles are set, to which are attached double cross arms, the poles being well guyed and braced, and everything possible being done to protect the wires from falling on the right of way.

The witness had never heard of Postal wires falling at such places, or being strung low enough to engage brakemen on top of freight cars. His attention was called to the testimony of Mr. McKeen giving a list of accidents to the block signal system of the Southern Pacific lines, and he stated that he understood from the transcript of the testimony that Mr. McKeen covered the entire Southern Pacific system, including Oregon Railroad & Navigation Company, and that his testimony did not indicate that the section involved in this suit was included, or that there is any trouble in that section. Nor does his testimony in giving these instances mention interruptions due to inductions.

He was further asked what effect induced current from a telegraph line carrying up to 375 volts would have on a parallel line such as a signal line, with such a

separation between the wires as that between New Era and Hito, and answered that induced current in a signal line could not be measured with the most sensitive commercial instruments. In fact, there is practically no induction, and the sensitive commercial instruments referred to are many times more sensitive than the line relays as used in the signal service. His attention was then called to the testimony of Mr. McKeen that the Southern Pacific had experienced trouble from induction caused by the Western Union on account of its line, particularly the signal line on a bluff for about half a mile, and he stated that there is nothing in the testimony to show that the Southern Pacific Company did anything at all to eliminate the trouble. That the trouble occurred, according to Mr. McKeen's testimony, several years ago, and it seems that they have done nothing since that time as the wires are still on the Western Union poles at that point, where the witness has seen them, and where he has observed that the operation of the trains and the semaphores was successful. These observations have been made at several times in the last two years, and the last time on May 14, 1913.

JOHN ANNAND, a witness called on behalf of the complainant, testified that he is President of the Postal Telegraph Company, the complainant, and has been such President since its organization in 1903. That he began work for a corporation known as the Pacific Postal Telegraph-Cable Company in the City of Portland in 1889 as a telegraph operator and that the Portland

office of this company was connected with the San Francisco office by a telegraph line that is now in operation over the right of way of the Southern Pacific and adjoining lands. That such line was operated from the time the witness began work with the Postal Company until the present time, and that he knows that such a telegraph line has been operated continuously since 1889. That he was operator for about one year, then night chief operator for about 3 years, and during that time used the wires referred to along and over the line of the Southern Pacific and adjoining lands. That repairs were being continuously made in order to keep the wires in good condition and that he never heard of any objection to such repairs being made. That he afterwards became day chief operator, a position which he occupied for five or six years and after that became Manager in the fall of 1901 or spring of 1902. That as day chief operator he had charge of the repairmen along the line of the Pacific Postal Telegraph-Cable Company from New Era to Eugene, and that it was his duty to look after the repairs of the line at that time. That he directed repairs to be made when necessary and knew that such repairs were made. That he received reports of the line being out of order or of poles being down and that during the time he was day chief operator he caused the line to be repaired by the erection of new poles many times without hearing of any objection being made to the operation of the line or the repairs. That his men never reported that they were interfered with by any of the railroad employees, and in the event of

such interference they would have reported or complained to him. That the Postal Telegraph Company, the complainant in this case, took over the lines and right of way of the Pacific Postal Telegraph-Cable Company and the witness first heard of objection being made to the use of the right of way of the Southern Pacific Company by the telegraph lines of the Postal Telegraph Company in July, 1911, at which time he was President of this company. That as such President he never heard of any objection being made previous to this date or of any interference being made with repairs to the line previous to this date. The witness then identified the minute book of the Postal Telegraph Company of which he was President. On cross-examination the witness said he had never heard of any dispute between the Postal Company and the Southern Pacific Company prior to 1911, and had never heard that Mr. Richard Koehler, Manager of the Southern Pacific lines in Oregon prior to 1904, had made requests to the Pacific Postal Telegraph-Cable Company to cease making encroachments at different places along the line. That so far as the witness knew no objection was ever made with regard to placing poles upon the right of way or renewing poles or anything of that kind prior to July, 1911. But he did not say absolutely that no such objection or request was made, although being President of the company he thought he was one to whom the railroad would have complained if they had made any complaint, and that no such complaint had been made to him. That he did not know to whom else they could have made complaint.

The witness further testified that there were some places along the right of way of the Southern Pacific Company where the poles of the Pacific Postal Telegraph-Cable Company were inside of the right of way, and some places where they were not inside of the right of way. That these encroachments existed at the time he entered the employ of the Postal Company and have remained with a few slight changes ever since. That he had no knowledge of the manner in which they got there originally and does not know of any specific encroachment that was placed there during his connection with the Postal Company.

B. S. DURKEE, witness on behalf of the complainant, testified that he is Manager of the Postal Telegraph Company. That he has been in the employ of the complainant the Postal Telegraph Company, and of the Pacific Postal Telegraph-Cable Company continuously since 1890, at which time he began work in Portland. That he became night chief operator of the Pacific Postal Telegraph-Cable Company in 1894 or 1895, and that it was his duty as such night chief operator to take care of emergency repairs, to repair the lines when they were blown down or when a pole went down, and that in fact he made such repairs possibly two or three times a month, depending on the weather. That he never heard of objection being made to the Postal employees going on the right of way or repairing or reconstructing the line when necessary. That he became day chief operator in 1902 and as day chief operator had

charge of the men who repaired the line in the event of trouble between Portland and Roseburg. That he occupied the position of day chief operator for about eleven years, during which time he had general charge of the repairs of the line and directed and had made such repairs as were necessary. He further testified that it became necessary for the Postal men during that time to go upon the right of way of the Southern Pacific Company to make repairs and that he remembers of no objection ever having been made to him or of any of his men ever having had any difficulty with the railroad company or the Western Union Company when making such repairs. That it became necessary to renew some of the poles and crossarms and to string new wires, two wires being strung in the summer of 1910 from Portland to San Francisco. That the witness had no knowledge of any objection being made to the stringing of these wires and that if the linemen had been met by any objection or obstruction in their work they would have reported to the witness, but that no such report was made of any objection prior to July, 1911, at which time the witness was Secretary of the Postal Telegraph Company, the complainant in this case.

The witness then identified the minute book of the Postal Telegraph Company, and over the objection of the defendant that it was incompetent and immaterial, there was read into the record the following excerpt from the minutes of the complainant contained in said minute book, to-wit:

“The Chairman stated that the Pacific Postal Telegraph Cable Company, a corporation of the State of New York, owns the following described lines of telegraph in the State of Oregon, to-wit:

“Pole line off county road from Goble to Portland, and on line of Southern Pacific Company from Portland to State line between Oregon and California, with three iron wires, and that the Pacific Postal Telegraph Company is willing to sell said lines of telegraph, together with the fixtures, office furniture and other property owned by the Pacific Postal Telegraph-Cable Company in the State of Oregon, to this company for the sum of \$10,000.00, payable in fully-paid, non-assessable capital stock of this company, being one hundred shares of the par value of \$100.00 each; the subscriptions already taken for said stock to be assigned to said Pacific Postal Telegraph Cable Company, excepting the shares to be held by the three directors, and said transferred property shall be considered as payment in full for the whole said one hundred shares.

“Thereupon J. Annand presented the following resolution and moved its adoption:

“ ‘Resolved that this company do and hereby does purchase said telegraph lines and properties from the said Pacific Postal Telegraph Cable Company on the terms mentioned above. And

“ ‘Resolved, that upon proper transfer and a proper conveyance of said lines and property being made to

this company, upon the present subscribers to the stock of this company transferring to said Pacific Postal Telegraph Cable Company, or its nominee, 97 shares of their subscriptions, the officers of this company do and they are hereby authorized and directed to issue to the Pacific Postal Telegraph Cable Company, or its appointee, 97 shares of the fully-paid and non-assessable capital stock of this company, and to issue the remaining three shares to the three directors of this company, one share to each.' ”

“B. S. Durkee seconded the motion for the adoption of the foregoing resolution.

“The motion on being put was duly carried by unanimous vote.”

Thereupon the defendants moved to strike out the entry as an attempt to introduce into the record evidence of their own declaration, which motion was overruled and decision reserved until the argument of the case.

Thereupon the complainant offered in evidence the deed from the Pacific Postal Telegraph-Cable Company to the Postal Telegraph Cable Company, executed in pursuance of the foregoing minutes, which deed was read into the record in order that the original might be returned, subject to the objection that it was incompetent and immaterial, said deed being in words and figures as follows, to-wit:

“KNOW ALL MEN BY THESE PRES-

ENTS: That the PACIFIC POSTAL TELEGRAPH-CABLE COMPANY, a corporation duly organized and existing under the laws of the State of New York, for a valuable consideration moving from the POSTAL TELEGRAPH-CABLE COMPANY, a corporation duly organized and existing under the laws of the State of Oregon, the receipt whereof is hereby acknowledged, has remised, released and forever quit-claimed, and by these presents doth for itself, its successors and assigns, remise, release, and forever quit-claim unto the said Postal Telegraph-Cable Company, its successors and assigns forever, all such right, title, interest, property, possession, claim or demand as it has or ought to have in or to all those certain lines of telegraph described as follows:

“A line from the state line between California and Oregon beginning at a point near Coolestine, Jackson County, Oregon, running thence in a northerly direction through the counties of Jackson, Josephine, Douglas, Lane, Linn, Marion, Clackamas, Multnomah and Columbia; via Ashland and Medford, Jackson County; Grants Pass, Josephine County; Roseburg, Douglas County; Cottage Grove and Eugene, Lane County; Albany, Linn County; Salem, Marion County; Oregon City, Clackamas County; Portland, Multnomah County, to the state line between Washington and Oregon at a point near Goble, Columbia County, Oregon, a distance of about three hundred sixty-four and three-fourths ($364\frac{3}{4}$) miles;

“A line beginning at a point near Goble, Columbia County, Oregon, running thence northwesterly and westerly through the counties of Columbia and Clatsop, via Rainier, Columbia County; and Knappa, Clatsop County, to Astoria, Clatsop County, a distance of about fifty-six (56) miles;

“Together with all the rights, title, interest and claim of the said Pacific Postal Telegraph-Cable Company of, in and to any rights of way under and in pursuance of which said telegraph lines were erected and maintained, and all fixtures, instruments, switchboards, batteries, office furniture, and all other appurtenances thereto belonging or in any way pertaining, subject, however, to a certain mortgage resting upon said property as well as other property to secure the sum of twenty million dollars (\$20,000,000) and interest, said mortgage being dated January 1st, 1897, and being the mortgage of The Commercial Cable Company to The Farmers' Loan and Trust Company as Trustee; **TO HAVE AND TO HOLD** the said premises unto the said Postal Telegraph-Cable Company, its successors and assigns, to its and their only proper use and behoof forever, so that neither the said Pacific Postal Telegraph-Cable Company nor any other person in its name and behalf shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred.

“**IN WITNESS WHEREOF**, the said Pacific

Postal Telegraph-Cable Company has caused these presents to be signed and its corporate seal to be hereunto affixed and duly attested by its proper officers, duly authorized so to do, this ninth day of December, 1903.

PACIFIC POSTAL TELEGRAPH - CABLE
COMPANY,

Attest:

By Wm. H. Baker,

J. O. Stevens, (SEAL) Vice-President.
Secretary."

The defendants then moved to have this stricken out as an attempt to introduce into the record evidence of their own declaration, upon which motion the Court made the same ruling.

The complainant then offered in evidence the supplementary Articles of Incorporation of the Postal Telegraph-Cable Company, filed April 2, 1909, for the purpose of showing the change of name of the Postal Telegraph-Cable Company to Postal Telegraph Company, whereupon the defendants admitted the fact of such change but objected to the proof on the ground that it was in immaterial.

Upon cross-examination, the witness being interrogated as to his connection with the different telegraph companies mentioned, a colloquy took place between counsel from which it appeared that there were two corporations with somewhat similar names, one being

the Pacific Postal Telegraph-Cable Company, a corporation organized under the laws of the State of New York, and still in existence, the other the complainant in this case. That the original corporate name of the complainant was Postal Telegraph-Cable Company, an Oregon corporation. That this name was subsequently changed to Postal Telegraph Company, which is the name that it now bears. The witness further testified that the stock of the complainant is owned as follows: The witness owned one share, J. Annand owned one share, E. J. Nally owned one share, and the balance, or remaining 97 shares, stand in the name of the Bankers' Trust Company of New York. That he had no knowledge as to whether the stock standing in the name of the Bankers' Trust Company was owned by any other person or corporation. The witness admitted that he had never been over the road of the defendant, Southern Pacific Company, as a lineman or in any other capacity as a workman for the complainant, but only as a traveler on the railroad trains, and that the knowledge that he would get of the conditions on the line would come to him by telegram or by letter. That a letter might have been addressed to the Postal Telegraph Company of Oregon which would have been received by the Manager and of which he would not hear. That he had never heard of any objection on the part of the Southern Pacific Company or of the Oregon & California Railroad Company to the occupancy of the railroad right of way by the lines of the Postal

Telegraph Company. That this company now has five wires of which the first two were strung in 1887, the witness thought, but could not testify to this fact of his own knowledge. That the third was added in 1898 after he entered the employ of the company, and that the two others were added in 1910. That the controversy arose between the complainant and the defendant, Southern Pacific Company, about a year later, in 1911. That the witness could not state how many poles were on the right of way nor could he definitely locate the particular poles. That he thought new poles had been erected upon the right of way since he entered the employ of the Postal Company, but that he could not of his own personal knowledge state that to be a fact. That poles had been renewed upon the railroad right of way wherever required, and that the larger portion of the pole line of the telegraph company from Portland to the Oregon-California state line is on private property, and that at other places it encroaches upon the right of way of the railroad company. That the witness was never in person out on the line and did not see old poles replaced with new poles upon the right of way of the defendant, but that he was firmly of the belief that such poles had been put in. That new poles are put in every few days maybe, or every month, and that he had knowledge of this fact because the men ordered poles and other supplies through him which went into the line. That he could not testify whether such supplies had gone into the line on that

part that is off the right of way or that part that is on the right of way except that the work is reported to him as having been done and that he takes it for granted, of course, that it is done.

Thereupon the complainant offered in evidence the certificate of the Secretary of State of the State of Oregon to the effect that Supplementary Articles of Incorporation were filed on the third of April, 1909, by the Postal Telegraph-Cable Company changing its name to Postal Telegraph Company, which were admitted subject to the same objection made in regard to the offer and admission of the Articles themselves.

J. J. LYNCH, called as a witness on behalf of the complainant, testified that he is connected with the Postal Telegraph Company as Superintendent of Construction of the Pacific division, which extends from the Canadian boundary line to the boundary line of Mexico, and east of the Rocky Mountains, and that as such Superintendent of Construction he has charge of the line of telegraph of the complainant between Portland and San Francisco along the Southern Pacific right of way. That the wire chief has direct charge of the repairs and maintenance, but that the witness looks after it in a general way. That he has occupied the position of Superintendent of Construction of the Pacific division since May, 1909, and that he has been familiar with the telegraph line from New Era to Eugene from that date to the present time. That he has been over the line a number of times and has inspected it several times,

and that he knows where the poles are erected and the wires strung.

That from New Era to Eugene the line is erected on the westerly side of the right of way except for a distance of 11 spans, which would about a third of a mile between New Era and Canby, and also at Aurora for a distance of 38 spans, which would be about a mile and a quarter. In these two places the line is on the easterly side of the right of way. That it is 103 miles from New Era to Eugene. That the lines of the Western Union Telegraph Company are on the westerly side of the right of way, all of this distance. That the right of way varies in width from 100 to 60 feet. That the poles of the Postal Telegraph Company are from 49 to 50 feet from the center of the railroad track where the right of way is 100 feet wide and from 28 to 30 feet from the center of the track, where the right of way is 60 feet wide. That there is a small piece of right of way near New Era which the witness understood is only 40 feet in width, and which he understands is about 1000 feet in length. That the poles of the Postal Telegraph Company are 23 feet from the center of the main track in this stretch. That where the right of way is 60 feet in width the poles of the Postal Telegraph Company are about 50 feet distant from those of the Western Union Telegraph Company, and where it is 100 feet in width they are from 70 to 80 feet apart. That at the place in Aurora where the poles of the Western Union and of the Postal

are both on the easterly side of the right of way there is one point where the separation between the wires is about 5 feet and at all other places the separation is from 15 to 20 feet. That in the distance from New Era to Eugene there are all told about 4 miles of poles of the Postal Telegraph Company which are set upon the right of way of the Southern Pacific Company, the poles being actually on the railroad ground. That the balance of the poles in this distance are set just on the outside of the railroad right of way line just off the line. In a few cases the poles are set a little further out, say one foot, two feet, some three feet, possibly a few four feet, but not very many. That the cross-arms range in length from 6 to 8 feet and that they overhang the right of way where the pole is set from 6 inches to a foot off the right of way from $2\frac{1}{2}$ feet to 4 feet. That there would therefore be a distance of from 26 to 28 feet from the center of the railroad track to the nearest part of the telegraph line where the right of way was 60 feet in width. That the poles are so set that neither the poles nor the cross-arms where they overhang interfere in any way with the operation of trains or with the operation of the Western Union Telegraph lines. That there is a signal system on the right of way of the Southern Pacific on the right of way for about 8 or 9 miles only of the distance between New Era and Eugene, the signal wires being placed on the westerly side of the right of way. The separation between the poles of the signal system and of the Postal

Telegraph Company is about 17 feet, except for 5 spans nearest to the New Era Station, where they are about 2 feet apart only and spread out till they get in this 5 spans till they get out to ten feet apart. That these signal wires were set there by the railroad company after the Postal lines had been erected. That the railroad consists of one main track from New Era to Eugene, and during the entire distance the wires are not attached to any of the buildings or fixtures of the railroad company nor to any of its bridges. That no part of the right of way between New Era and Eugene where the poles of the Postal Company are located or where its cross-arms overhang the right of way is being used for railroad purposes, and that it is vacant and unoccupied land.

That the witness had charge of the repairs and construction between New Era and Eugene in the summer of 1911 and had a foreman on the ground, one L. S. Parrett.

That the life of a telegraph pole line varies from 15 to 30 years. That the condition of the poles between New Era and Eugene is that some of them are very old and look as though they might have been there anywhere from 20 to 25 years; that they show the result of the elements and are rotting and worn and covered with moss. That the foreman, Parrett, was engaged in 1911 in reconstructing the pole line and had material to and was instructed to replace all of the old poles. That he was instructed to place them in the same iden-

tical spot where the present poles stand, taking out the old poles and putting in the new poles in their places. That the witness during the two years he acted as Superintendent of Construction prior to 1911 did not know of any objection being made to the Postal Company operating the line or reconstructing it or putting in new poles where needed. That the first objection made was in July, 1911. That the witness has been over the line frequently enough so that he could and did state that there were evidences of repairs having been made to the line between New Era and Eugene. That these evidences showed that poles that had rotted off had been re-set; that is, the old stump pulled out and the old pole dropped down and the poles had been stubbed. By stubbed I mean that the present pole was left in the ground and a piece about 8 or 9 feet long set down in the ground alongside of the old pole and the two lashed together with a wire band around the top of the pole or held together with a bolt. That a number of poles had been replaced with new poles and a number of cross-arms had been put on the old poles in place of the old arms, and that new cross-arms had been put on the new poles that were used. That these conditions were scattered along the line, a pole here and a pole there, and a cross-arm there. That certain of the poles that were placed in there indicated to the witness that they had been re-set during prior years anywhere from ten to twelve years. That the line in general was the oldest looking line the witness ever saw.

That the poles indicated they had been in there anywhere from 20 to 25 years, but that the indications were that some had been replaced and had been in there from 10 to 15 years, and others looked as though they had just been set the year previous. That in 1910 the witness had charge of the stringing of two wires from San Francisco to Seattle that went through this section, and that no objection was made by the Southern Pacific Company in regard to the stringing of those wires anywhere between Eugene and New Era or anywhere from Portland to the Oregon-California state line. That the work was done in the day time along the right of way and consumed about ten or fifteen days' time for the section between New Era and Eugene. That there were from 14 to 16 men in the gang. That no poles were re-set or new cross-arms put up at that time, but that the two wires were strung and insulators and additional pins put in where needed. That the witness was up and down the right of way superintending the work during the time of the stringing of these new wires and saw employes of the railroad company while the wires were being strung. That the foreman who had charge of the actual work in the field was J. L. Coyle.

On cross-examination, the witness being interrogated about his knowledge of the different telegraph companies comprising what is known as the Postal Telegraph system, stated that he had no definite knowledge of these points. That he received his pay through

the San Francisco office. That his immediate superior is Mr. J. G. Blake, General Superintendent, at San Francisco. That he rendered services to the Postal Telegraph Company in California and to the Postal Telegraph Company in Oregon. That the messages sent over the line of the Postal Telegraph Company of Oregon went without any break in the line between Oregon and California, but that his knowledge was confined to the construction end of the line, and that he had charge of the construction in the Pacific division which comprises all of the lines of the Postal Telegraph companies from the Canadian boundary line to the Mexico boundary line, and also any lines running east and west. That all these lines form one continuous system. That from a physical standpoint it was impossible to tell when the property of one company ceases and the property of another begins, although the cost of the construction of these lines is divided among the states comprising the district, as is the cost of repairs.

The witness stated that in determining the 8.59 miles of block signal system between New Era and Eugene he did not include station protection signals. That he does not know of any such signals between Hito and Eugene.

Referring to his statement that none of the wires of the Postal Company is attached to any of the properties of the railroad company or, rather, to any structures of the railroad company, the witness was asked as to the fact in regard to wires being attached to the bridge

at Harrisburg. He stated that the Postal line crosses the river at that point on high poles with a span about 800 or 900 feet in width, and that there is no attachment to the bridge. He did not know whether the wires were ever attached to that bridge.

The witness testified that he knew of new cross-arms that had been placed on the poles of the Postal Telegraph Company between New Era and Eugene subsequent to 1909 at various places along the line, but that he could not give the specific locations of such cross-arms. He could not state positively that any such cross-arm was put on the pole that actually stood on the right of way, but knew that new cross-arms had been put on and did not know now as to whether the pole stood just outside the right of way or whether it stood on the right of way. That these cross-arms were cross-arms put on to replace old ones, but that no more cross-arms than those that were on the poles of the Postal Telegraph Company prior to the witness coming to the Pacific Coast have been placed on such poles since 1909. That no new poles have been set or any poles set in new places on the right of way since the witness took charge of the work, but that two additional wires were strung between New Era and Eugene and from Eugene to Myrtle Creek in 1910.

That when the Postal Company was stopped doing work, the work had progressed about 4 miles north of Salem, where it was started, but that the witness did

not wish it to be understood that the Postal Company had reconstructed its line over 103 miles before the Southern Pacific Company made any objection.

The witness then explained again what he meant by stubbing old poles and stated that during the last four years probably fifty old poles had been stubbed. That he did not know whether such poles were on the right of way or just off of the right of way. That some of them were likely on and some of them off. That such re-stubbed pole occupies probably twice as much ground or a little less than a pole not stubbed, depending on the size of the stub.

The witness stated that the right of way between New Era and Eugene is fenced on both sides most of the way except at station grounds and public road crossings, and that there is no reason why the width of the right of way could not be determined in the parts where it is fenced by one examining it.

In regard to the line south of Roseburg, the witness testified that the Postal line is constructed on the easterly side for the first 10 or 15 miles out of Roseburg south, and that the block signal system is on the same side of the right of way and the Western Union is on the westerly side. But that the Postal lines are outside of the right of way right at this point.

The witness further stated that in the vicinity of Medford and Ashland the Postal line would be recon-

structed with cross-arms longer on the private property side than on the railroad side. That in that section the line was constructed on the wagon road away from the railroad entirely, and a private right of way was secured just outside the railroad right of way. This work was done in 1910. The poles were set close to the fence in order to satisfy the private property owners and the cross-arms were set over on the side of the poles. That this occasions awkwardness in the looks of the pole and that the construction is not regarded as proper construction, although it constitutes a permanent line and is working all right. That this is all straight construction and is only for a short section and the work could not be done in this way between New Era and Eugene because there is a great deal of crooked construction. That, however, this method of construction could be adopted for the long stretch of straight track near the station of Tangent, being from 17 to 20 miles in length where the line is absolutely straight. But that where there is a curvature in the line it is very hard to keep the cross-arms in line when they are constructed all on one side of the pole, since there is nothing on the other side of the pole to balance.

The complainant then offered in evidence, proof of the acceptance of the Post Roads Act of Congress by the Pacific Postal Telegraph-Cable Company, a New York corporation, and by the Postal Telegraph-Cable Company, an Oregon corporation (now Postal Telegraph Company, the complainant in this case). That

due proof of such acceptances as made has been stipulated herein.

J. G. BLAKE, a witness on behalf of the complainant, testified that he is General Superintendent of the Pacific division of the Postal Telegraph system, and has been connected with the telegraph business for about 38 years. That he was working at Donald, in British Columbia, on the Canadian Pacific in February, 1887, and knows that the line of telegraph from San Francisco to Portland over the line of the Southern Pacific was opened at that time, since messages from San Francisco to New York were transmitted by means of this line to New Westminster, British Columbia, and from there over the Canadian Pacific to Montreal. That he became connected with the Pacific Postal Telegraph-Cable Company in 1888, at which time the Pacific Postal had a line from the Canadian-Washington boundary to San Francisco, and that this line, which is the line in controversy in this case, was operated from 1887 continuously. That the witness went from Canada to Seattle in 1889 as Manager of the Seattle office, and that there was no route by which the Postal could send messages from Seattle to San Francisco other than the line operated over the Southern Pacific to the Oregon-California state line. That in April, 1902, the witness was appointed District Superintendent of the Second District, which included Washington and Oregon, and as such District Superintendent had supervisory charge of this particular piece of line. That he had

supervision of all of the company's affairs and in the general course of the business any reports of complaints or of encroachments or anything of that kind from property owners would come to him. That during the time he was Superintendent of the Second District, he never knew of any complaint being made or objection being made by the Southern Pacific Company to the Postal Company operating the line in question. That the Postal Company was repairing the line continually and that no permission to make such repairs was ever asked, nor was permission to operate the line ever asked or granted. That the witness held the position of Superintendent of the Second District until February, 1907, at which time he was made Assistant General Superintendent, with headquarters at San Francisco. In June, 1908, he was made General Superintendent. That during the time he was Assistant General Superintendent, he had general charge of this line on the Southern Pacific right of way in Oregon subject to the General Superintendent's instructions, and as such Assistant General Superintendent he would have been aware of any objections had any been made by the railroad company to the use of the right of way for telegraph purposes. That he knows of no such objection ever having been made or of any interference with the linemen or other employes of the Postal Company. That he does not know of permission ever having been asked of the railroad company to repair the line or to operate it or of any money having been paid at any time for the right to use it or of any leases having been executed.

That as General Superintendent he had charge of the Pacific division, in which is included the State of Oregon, and as such General Superintendent he never knew of any objection being made prior to July, 1911, by the railroad company with reference to the use of this section between New Era and Eugene. In 1909, however, the Southern Pacific did object to the reconstruction of the line where it overhung and encroached on the right of way near Gold Hill, a point between Grants Pass and Ashland, and that short piece of line was removed from the right of way. A short piece two or three miles altogether was reconstructed on the highway. That this particular complaint is the only one the witness ever heard of during the time he was Superintendent of the Pacific division or of the Second District, prior to 1911.

The witness stated that the cost of erecting a telegraph line for 103 miles over the country like that from New Era to Eugene would have been from about \$150 to \$175 a mile in 1887 or 1888. That at the present time it would cost from \$300 to \$350 per mile to erect such a line.

On cross-examination the witness testified that he did not know just how much of the Postal line was actually on the right of way. That he knew that it was on and off at different points all the way from Portland to the Oregon-California state line, and that he judged there would be about three or four miles of poles actually on the right of way, excluding the part

where the cross-arms overhang and the poles are located off the right of way. The witness was then interrogated as to his employment by and relationship with the Pacific Postal Telegraph-Cable Company and testified that he was never an employe of that company, but that he is employed by five or six different corporations, there being one in each of the states in the Pacific division. That he does not know what corporation owns these different local corporations, although he understands that the corporation called the Mackay Companies controls them. That the managing agent for the State of Oregon in 1907 for the Pacific Postal Telegraph-Cable Company was, he thought, John Annand, who was at that time and is yet, the President of the Postal Telegraph Company of Oregon.

The witness further testified that at about the time the reconstruction of this line from New Era to Eugene was begun, the Postal Company took up with the Southern Pacific Company the question of this reconstruction, since it wanted to be on amicable terms with the Southern Pacific Company and wanted to get free cars for outfit, etc., and the use of their handcars. That the witness had conversation with Mr. Sutherland, in which he told him what the Postal Company wanted to do and in which he was informed that the Southern Pacific Company would do what it could to prevent us. That this conversation took place in the spring of 1911. That prior to this conversation with Mr. Sutherland, a request had been made of Mr. O'Brien, who turned the

matter over to Mr. Sutherland.

That the witness had been a witness in the case of Pacific Postal Telegraph-Cable Company against the Oregon & California Railroad Company, and that as the witness understood the intention of the Pacific Postal Telegraph-Cable Company, it intended to build a new line on the right of way—not reconstruct the line of the Postal Telegraph Company where it then stood—but to get on the right of way in all parts, it being the intention to get the line wholly on the right of way so that the cross-arms would not overhang private property. That the witness thought it was the intention to abandon the line discussed in this suit and put in an entirely new line of poles and wires which would be the only one, and that such line would have been owned by the Pacific Postal Telegraph-Cable Company in the event that it had been constructed by it over rights secured by condemnation, had such rights actually been secured.

That in 1911, when the witness discussed this matter with Mr. Sutherland he thought the Postal Company had a right to maintain and reconstruct its line on the right of way acquired by prescription, but he was doubtful, owing to the objections that had been made in 1909 down at Gold Hill. That the Postal Company was asked to sign a lease which they refused to do. That this refusal was based on the fact that the Postal Company wished an easement and objected to being required to move at the discretion of the General Man-

ager of the Southern Pacific Company; that is, it objected to the General Manager saying: "We want you to move off. Move off." What the Postal Company wanted was something to show that it could be required to move off only in case the land was wanted for railroad purposes. That that was the principal contention between the Postal Company and the Southern Pacific Company—that and the paying of rent. That the witness thought at that time the Postal Company refused to pay any rent.

That the witness had no actual knowledge of whether the line was originally constructed on or off the right of way of the Southern Pacific Company, and while he knows that new poles have been put in, he has no knowledge that additional poles have been put in in new locations.

J. L. COYLE, a witness on behalf of the complainant, testified that he is District Foreman for the Postal Telegraph Company, residing at Seattle, Washington, and has jurisdiction over the Second District. That he is familiar with the telegraph line running from New Era to Eugene, and also with this line from Portland to the Oregon-California line. That he began work for the Postal Telegraph Company on the first day of February, 1887, and the first time he saw the line north of Roseburg was in 1893 or 1894, previous to that time, between 1887 and 1893, he had worked as a lineman on repairs from Roseburg south. That he first went over the line on foot in 1910, at which time he was in charge

of the gang stringing two new wires. That these wires were strung from Davisville, California, to Goble, Oregon, except from Ashland to Roseburg, and from Ashland to Grants Pass. From Ashland to Grants Pass they were strung along the public highway. That the witness had charge of the stringing of these wires between New Era and Eugene and was engaged on that part of the road about one month. He had in his employ 18 men and met with no objection from the railroad company, nor was his work interfered with by any one. That he has had thirty years' experience as a lineman and observed the poles along the right of way from Grants Pass north to Portland. That he is able to judge from the appearance of the pole about how long it has been in the ground, and judging from his experience based upon previous knowledge, he judged a great many of those poles had been in the ground from 25 to 30 years. That they were old and rotten above the ground and rotten below the ground, and moss-covered, and had every indication of age. That he noticed that new poles had been set between New Era and Eugene, he judged perhaps ten per cent. That many of the old poles had been stubbed. That the Postal Telegraph poles between New Era and Eugene are nearly all on the west side of the right of way, the Western Union poles being on the east side. That he had observed the block system poles which were on the west side for the most part. That there is one place in which these block signal wires are about 2 feet from the Postal wires. That the remaining block system wires were

from 6 to 30 feet distant. That he has been over the line many times since the stringing of the wires was finished in 1910, and that he was District Foreman at the time the repairs on the Postal Telegraph line were stopped by the Southern Pacific Company in July, 1911. That the foreman in charge of this construction work was L. S. Parrett.

On cross-examination the witness testified that he had no knowledge of the line from Roseburg north prior to 1910, except knowledge gained by a trip made in 1903 or 1904, in which he observed the line from the railroad train. That he has no knowledge of additional encroachments having been made by the telegraph company since he has been employed by it, or no knowledge of how these poles and wires happened to be on this right of way in the original instance.

L. S. PARRETT, a witness for the complainant, testified that he is employed by the Postal Telegraph Company and was a foreman of this company in July, 1911, engaged in reconstructing and rebuilding the line of the Postal Telegraph Company along the right of way of the Southern Pacific Company between New Era and Eugene. By reconstructing and rebuilding he meant taking out the old poles and fitting in new poles, and changing the wires to the new poles. That in this reconstruction work the old poles would be taken out and new poles placed in the identical spot from which the old poles had been removed. That this work in no way interfered with the business of the railroad,

and that the men engaged in the work were not on the right of way to any considerable extent because many of the poles were set on the outside of the right of way, or just outside of the fence. In some places they would be within a foot of the fence, some places two feet and some places possibly three feet. That the public roads and not the railroad right of way were used for hauling material. That in two places by reason of physical conditions the men went on the right of way in order to get their material to the proper place, but that they did not go upon the railroad bed and kept from 20 to 25 feet from the track, and did not interfere with the operation of the railroad. That when the work was begun the witness was instructed to proceed carefully and in such manner as would cause no injury to the railroad, and that these instructions were carried out as nearly as the witness knew how. That new cross-arms were put on all the poles that were set. Some of these cross-arms overhung the right of way and others did not. Sometimes on curves the cross-arms would overhang three or four feet, sometimes only two feet, and that the old cross-arms had overhung the right of way in the same manner. That in the particular part of the line which was reconstructed by the witness no poles were put inside of the right of way; that is, inside of the fence. That the work was begun at Salem and was completed as far as Chemawa, about four miles. That the old poles were worn out and rotted and needed to be replaced with new ones. That they were in a con-

dition where they would have been likely to fall upon the right of way if they had not been re-set and new ones put in. That the witness has been a lineman for about twenty-four years and a foreman for about seventeen years of that time. That he is able to form an idea of the length of time a pole has been standing from its appearance, and that the poles along the right of way in question, in his opinion, had been there over twenty years. That the life of a telegraph line is from 20 to 25 years. That some of the old poles had been re-set and some had been stubbed. That there was no interference with the work until the witness went out to work one morning and found that some of the new cross-arms had been cut off, about 80 or 85 in number. That none of the old cross-arms had been cut off, but simply the new ones that had just been put in. That these new cross-arms were in the same position with relation to the right of way that the old ones had been in, and were placed on poles set in the same places.

On cross-examination, the witness testified that new cross-arms were put in on all the poles except occasionally a pole would be found that had been put in within the last few years or the last year or two, in which case no new cross-arm would be put on. That the cross-arms which were sawed off were the ones which hung over the right of way over the fence.

RICHARD KOEHLER, called as a witness on behalf of the defendants, testified that he came to Oregon

in 1874, and was appointed auditor and chief engineer of the Oregon & California Railroad Company. In 1876 he was appointed manager and held this position until 1885, when the property was placed in the hands of a receiver. That the plaintiff in the suit in which a receiver was appointed by the United States Court was Lawrence Harrison. That the witness acted as receiver and manager from January, 1885, to June, 1888, when the property was turned over to the Southern Pacific Company under a lease, and that thereafter the witness acted as manager for the Southern Pacific Company until 1904. That as such receiver and general manager, he had full control of the lines within the State of Oregon, and that all of the important business transactions of the Oregon & California Railroad and Southern Pacific Company during this period came under his supervision. The witness stated that he remembered when the Pacific Postal Telegraph-Cable Company made an application to the United States Circuit Court for permission to place poles and wires upon the right of way of the Oregon & California Railroad Company.

It was then stipulated between the counsel that the petition and order of court set out in the answer of the Southern Pacific Company are correct as therein set out; that is, that they are true copies of the original petition and order as of record in the United States Circuit Court for the District of Oregon. The witness then being asked what the circumstances were which

led up to this application by the Pacific Postal Telegraph-Cable Company having been made, objection was made to such question on the ground that it was irrelevant and immaterial. The witness testified that he did not recollect the circumstances in detail. The witness did not recall whether the Pacific Postal Company came to him asking for permission, or whether it went direct to the court. He did remember that it was done by a petition to the court, and that an order was issued to him to permit the Pacific Postal to occupy such parts of the right of way as were needed, and as did not interfere with the business of the railroad company. He remembered particularly that the Postal Company wished to fasten their wires to the railroad bridge across the Willamette River at Harrisburg, and that this was permitted by the order. The witnesses' attention was then called to the fact that the petition referred to certain localities, as follows:

"From Portland, Oregon, fifteen miles south to Oregon City; and from a point near Eugene City to Goshen, and from the station of Yoncalla to Roseburg, and within a distance of about one mile in length along and near said railroad and near the station of Woodburn, and at a few minor points of very limited extent, say two or three poles each." The witness then said that the encroachments upon the right of way of the Oregon & California Railroad Company for the distance of about four miles between New Era and Eugene, he thought were made shortly before or imme-

diately after the petition was filed, and that such encroachments were made with the permission of the Court. The witness was then asked the question: "Well, the petition to the court, Mr. Koehler, confines the district upon which they may build to certain definite localities. Now, the testimony of the plaintiff has shown that the Postal Company has encroached upon other localities about that same time . . . a great many years ago, and I want to know from you whether or not those encroachments which are not included in this petition were made with the same general understanding as those specifically set out in the petition." To this objection was made on the ground that it called for a conclusion and was incompetent. The witness answered that the encroachments were made with the permission of the railroad company, and that no objection was made by him at any time during the construction of the telegraph line on account of encroachments made by the telegraph company; that the railroad company permitted them to go on, so far as their line did not interfere with the railroad business, they were allowed to go on. That he knew that the poles and cross-arms encroached upon the right of way and had no objection to this fact. That he did not recollect whether the line was constructed in part before the order of court was made, or wholly afterwards. The witness did not recollect, but thought that the line from Portland to the Oregon & California line was completely constructed by the end of the year 1888. He was then asked the question: "Were such encroachments as

were made while you were receiver made under the order of the court as you understood it?" To which question objection was made as calling for a conclusion or a construction of the order of court, to which he replied: "Yes, sir." He then testified that he was discharged as receiver on January 11, 1888, at which time the railroad properties were turned over to the Southern Pacific Company, in reality to him as manager of this company.

Over objection the witness continued to testify that he allowed the telegraph line to remain upon the right of way while he was general manager because it did not interfere with the operation of the line, and because their relations with the Postal Company were quite friendly; that this company helped the railroad company off and on. That no negotiations were had between the Southern Pacific Company and the Pacific Postal Telegraph-Cable Company at the termination of the receivership; that the latter company simply remained on the right of way and nothing took place. That the witness understood that they were there at the will of the railroad company, with the understanding that the railroad company would not remove the Postal line unless there was some necessity for it. That up to 1904 the witness never heard of any claim being asserted by the Pacific Postal Telegraph-Cable Company, or by the Postal Telegraph Company of Oregon, or any affiliated company, to the effect that these poles and wires were there by any right in the Postal com-

pany. That up to 1904, at which time the witness gave up the management of the road, he never heard of any claim of ownership by the Postal Company or any company which claimed to own this telegraph line, of any ownership in the right of way, or of any claim other than the right given by order of the court, and that during all that period the witness was willing to permit the Postal Company to remain on the right of way so long as it did not interfere with the operation of the road, and did so permit it to remain.

On cross-examination the witness recalled that the line was completed prior to June, 1888, at which time he was discharged as receiver, and stated that his impression was not quite clear, but it was possible that a portion of the line had been constructed prior to the time the petition was made to the court, and that the crossing of the bridge at Harrisburg was the occasion for the discussion arising. The witness was further of the opinion that the construction of the wire on the right of way was begun prior to the time the petition was filed, and that the real thing that induced the application to the court was the right to attach wires to the Harrisburg bridge.

C. G. SUTHERLAND, called as a witness on behalf of the defendants, testified that he started work for the Oregon & California Railroad Company as messenger in 1885, and went into the office of Mr. Koehler in 1887. That he worked with him in various positions until July, 1904, at which time he was chief clerk. That

in July, 1904, he went into the office of E. E. Calvin, general manager of the Southern Pacific Company lines in Oregon, where he worked until 1910, at which time he was appointed assistant general manager, a position which he retained until October, 1911, when the managements of the Oregon Railroad & Navigation Company lines and the Southern Pacific Company lines were segregated, the witness remaining with the Oregon-Washington Railroad & Navigation Company.

That during the time he was with Mr. Koehler, witness had practical charge of the office, attending to all detail matters, correspondence, and things of that kind. That as assistant general manager under Mr. O'Brien, the witness worked directly under his orders, and attended to all matters which in his opinion were not of sufficient importance to justify Mr. O'Brien's attention. That working in these various capacities, he had supervision of the correspondence of the office, and was in a position to know whether any transactions were taking place between the Postal Companies and the Southern Pacific Company; that he never heard of any claim being asserted by any of the Postal Companies of any right in the property of the Oregon & California Railroad right of way until July, 1911, at which time Mr. Blake, General Superintendent of the Postal Company, accompanied by Mr. Annand, their manager, at Portland, called at his office. Mr. Blake stated that the Postal Company intended rebuilding their line between Eugene and Springfield Junction,

and between Portland and Salem. A few days later Mr. Annand made request on the Southern Pacific Company for outfit cars for use of gangs in renewing the line above referred to, and a few days later wanted a work train assigned to him to distribute poles and other material, which the railroad company declined to do, for the reason that the Postal Company had declined to enter into any agreement with the railroad company in regard to their right to be upon the railroad right of way. The witness stated that at the conference with Mr. Blake, in 1911, Mr. Blake claimed that the Postal Company had a prescriptive right in the right of way. That the Postal Company claimed the right by prescription—a right of way for such poles and wires as were already upon the right of way of the company, and that he had never heard of any such claim on the part of the Postal Company prior to that date.

He continued that Mr. Blake called to see Mr. O'Brien about the 18th of July, 1911, but Mr. O'Brien being absent, a conference was had between Mr. Morrow, the right of way agent, Mr. Klippel, the Assistant General Manager of the Southern Pacific Company, in charge of telegraph; Mr. A. H. McKeen, the Southern Pacific Signal Engineer; the witness, Mr. Annand and Mr. Blake. At this conference Mr. Blake was told that the position of the railroad company was that they would make an agreement with the Postal Company under which the Postal Company should pay a pole rental of 40 cents per pole and two cents per cross-arm

overhanging the right of way per year, with the understanding, however, that the railroad company had the right to call for removal of these poles whenever they interfered with the operation of the trains or railroad, or with the operation of the Western Union line, or interfered with the signal line. At this conference Mr. Blake at first flatly refused to execute such an agreement, but finally agreed to lay the matter before his people. That subsequent to this conference, Mr. Blake communicated with the witness, and informed him that it would proceed with reconstructing its lines, and if interference was made with such reconstruction would start legal proceedings to prevent such interference. That this communication took place two or three days after the conference referred to.

This last communication was what caused the trouble between the Postal Company and the railroad company. / After this communication from Mr. Blake the witness consulted counsel, and was advised that he had authority to stop this reconstruction by all reasonable means, using force, if necessary, and was further advised that he might go ahead and cut down their poles where they were renewing them on the right of way, or that he could cut their cross-arms.

On the same day Mr. Blake wrote the witness, the section foreman reported that the Postal Company was proceeding to reconstruct their line and asked instructions of the superintendent. The superintendent was

instructed to remove every pole that was replaced, and to cut down any new cross-arms put up to replace old ones so far as the same overhung the right of way line. That the relations existing between the Postal Telegraph Company and the Pacific Postal Telegraph-Cable Company on the one hand, and the Oregon & California Railroad and the Southern Pacific Company on the other hand, during the years of the employment of the witness, were very friendly; that the Postal Company very frequently in times of trouble extended the use of its line to the Southern Pacific Company, and that it was a common occurrence in time of trouble for the telegraph operators of the railroad company to go right over to the office of the Postal people and sit down at their keys and transact their business. That the Postal Company used the tracks of the railroad company for their speeders with the permission of the railroad company, and that the use of the telegraph line of the telegraph company by the railroad company was with the permission of the Postal Company, and without charge. That prior to 1911, the witness never heard of any claim on the part of the Postal Company that its use of the right of way was other than permissive, and over the objection of the complainant, he testified that the use of the right of way by the Postal Company was permissive.

Thereupon the defendants offered in evidence judgment roll No. 3159 in the Circuit Court of the United States for the District of Oregon, in the case of Pacific

Postal Telegraph-Cable Company v. Oregon & California Railroad Company and Southern Pacific Company. The complainant made the objection that the same was not competent under any facts relevant in this case; that it was not an adjudication of the rights between the parties litigating here, and it was entirely incompetent, irrelevant and immaterial. It was then agreed between counsel that pages 23 to 90 in the defendants' answer is a correct transcript of the record, and that the answer states the proceedings correctly. This admission being made to avoid putting the long judgment roll in evidence.

Thereupon the defendants introduced in evidence, over the objection of the complainant, that it is incompetent, irrelevant and immaterial and constitutes no defense, the contract between the Western Union Telegraph Company and the Southern Pacific Company.

Thereupon the testimony of A. H. McKeen, given in the case of Pacific Postal Telegraph-Cable Company v. Oregon & California Railroad Company and the Southern Pacific Company was received in evidence, with the same effect as if the witness was upon the stand and testifying here, in so far as the same is applicable to the issues of this case, and subject to the objections interposed at various times during the taking of said testimony.

WELCOME I. CAPEN, a witness on behalf of the complainant, testified that he was General Superin-

tendent of Plant of the Postal Telegraph-Cable Company. That he has been in the telegraph business since 1864 and has been connected with the Postal Telegraph system about 26 years, during most of which time he has been in the construction department. That he has been General Superintendent of Plant for the last three years. That his position is ranked as the highest in the company, with the exception of the positions of Vice-President, General Manager and President. That his duties are to see that the lines of the company are built and kept in repair, and include the construction of new lines, as well as the reconstruction of old ones. That it is part of his duty to take part in the negotiation of contracts with railways for the construction of telegraph lines on railroad rights of way that the Postal system has been constructed in part on railroad rights of way under contracts executed between the railroad companies and the subsidiary companies of the Postal Telegraph system, particularly in Kansas, Oklahoma, Texas and Louisiana. And also under consent to decrees entered in condemnation proceedings against the Southern Pacific Company. (To this testimony objection was made on the ground that it was incompetent, immaterial and irrelevant, and upon the further ground that the testimony of the witness is not the best evidence). The witness, over objection, testified that he had certain original contracts with the subsidiary companies of the Postal Telegraph system and different railroads. That he represented the Postal Telegraph companies in carrying out these contracts, which in part had been completed and in part were uncompleted.

He then identified an agreement between the Kansas City Southern Railway Company; Kansas City, Shreveport & Gulf Railroad Company, and the Texarkana & Ft. Smith R. R. Company on the one part, and the Mackay Telegraph-Cable Company and the Commercial Telegraph & Cable Company on the other part, dated February 28, 1911. He testified that he had been in general charge of the construction and repairs of the Mackay Telegraph & Cable Company and the Commercial Telegraph & Cable Company referred to in the contract, and testified over objection on the ground that it was incompetent, irrelevant and immaterial and called for the conclusion of the witness, that it was his duty to carry out the contract referred to, and that he had given orders that such contract be carried out.

It was then stipulated that the execution of the contracts between the various telegraph companies and railroad companies produced by the witness and referred to in his testimony, need not be proven by proving the signatures of the officers to the contracts or attaching the corporate seals thereto, or the authority of the officers to execute the same. The contract was offered in evidence and was objected to as incompetent, irrelevant and immaterial, and in no way binding upon this defendant. It was marked "Plaintiff's Exhibit 1." The witness then identified an agreement between the St. Louis Southwestern Railway Company and the Mackay Telegraph & Cable Company, dated October

28, 1911. The same objections were made in regard to this contract and the same testimony given in regard thereto by the witness as in the case of Exhibit No. 1. The contract was then marked "Plaintiff's Exhibit 2."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Missouri, Kansas & Texas Railway Company and the Postal Telegraph-Cable Company, dated September 18, 1911, this contract being marked in evidence "Plaintiff's Exhibit 3."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Chicago, Rock Island & Gulf Railway and the Mackay Telegraph & Cable Company, dated April 28, 1911, this contract being marked in evidence, "Plaintiff's Exhibit 4."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Atchison, Topeka & Santa Fe Railway Company and the Kansas Telegraph-Cable Company, dated November 3, 1910, this contract being marked in evidence "Plaintiff's Exhibit 5."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Atchison, Topeka & Santa Fe Railway Company and Postal Telegraph-Cable Company, dated November 3, 1910, this contract being marked in evidence "Plaintiff's Exhibit 6."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Gulf, Colorado & Santa Fe Railway Company and the Postal Telegraph-Cable Company, dated November 3, 1910, this contract being marked in evidence "Plaintiff's Exhibit 7."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Gulf, Colorado & Santa Fe Railway Company and the Texas Telegraph Company, dated November 3, 1910, this contract being marked in evidence "Plaintiff's Exhibit 8."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Gulf, Colorado & Santa Fe Railway Company and the Texas Telegraph Company, dated January 21, 1911, this contract being marked in evidence "Plaintiff's Exhibit 9."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Atchison, Topeka & Santa Fe Railway Company and Postal Telegraph-Cable Company, dated August 17, 1911, this contract being marked in evidence "Plaintiff's Exhibit 10."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Texas & Pacific Railway Company and the

Commercial Telegraph & Cable Company, dated November 29, 1911, this contract being marked in evidence "Plaintiff's Exhibit 11."

The same procedure was followed, testimony given, and objections made in regard to an agreement between the Texas & Pacific Railway Company and the Mackay Telegraph & Cable Company, dated November 29, 1911, this contract being marked in evidence "Plaintiff's Exhibit 12."

The same procedure was followed, testimony given and objections made in regard to an agreement between the Texas & Pacific Railway Company and the Mackay Telegraph & Cable Company, dated November 29, 1911, this contract being marked in evidence "Plaintiff's Exhibit 13."

The witness then identified a certified copy of a judgment and decree entered in the case of Postal Telegraph Company against the Southern Pacific Company, the Central Pacific Railroad Company and the Western Union Telegraph Company in the Superior Court of the County of Sacramento, State of California, dated June 26, 1911. The same procedure was followed, testimony given and objections made in regard to this decree as in the case of the contracts hereinbefore referred to, and that decree was then received and marked in evidence "Plaintiff's Exhibit 15."

The witness then testified that the distance between

the rails of a standard gauge, single track railroad is 4' 8 $\frac{1}{2}$ ", and assuming that such single track is laid in the center of a railroad right of way 60 feet wide, the distance from the rails to the outer edge of the right of way would be 27' 5", the width of the rail being 2 $\frac{3}{4}$ ". He further testified that assuming the right of way is 60 feet in width, that there is a single track railroad in the middle of the right of way and a line of telegraph poles set within 5 feet of the outer edge of the right of way, the poles would stand 22 feet 5 inches from the outer edge of the nearest rail. That if they were set on the edge of the railroad right of way they would be 26' 5" from the nearest rail. In these computations one foot for the diameter of the poles was taken into consideration. That the length of the cross-arms on the poles of this complainant on the right of way of defendant, Southern Pacific Company, from New Era to Eugene vary. That the cross-arms which were attempted to be placed by the complainant on these telegraph poles, and which the defendant, Southern Pacific Company, objected to, were 8 feet long and were attached to the poles in the centers of the cross-arms, and that they projected from the center of the pole 4 feet. That such 8-foot arms placed on a pole standing just within 5 feet from the outer edge of the right of way would bring the nearest end of the arm 18 feet and 11 inches from the outside of the rail under the conditions above outlined, and that this distance would be 22' 11" if the poles were placed on the extreme outside edge of the railroad right of way. That these

conditions would be true in regard to an average pole, by which the witness meant a pole from 25 to 30 feet in height, about 1 foot in diameter, 5 feet from the bottom, which is the depth at which such poles are usually set in the ground.

The witness was then asked the question:

Q. Now, assuming that there were railroad signal wires and poles upon a railroad right of way and on the same side of the railroad tracks there were telegraph poles so erected that the telegraph wires would come within four feet of the railroad wires if both sets of wires were located on the same level, what would be the approved mode of construction to keep these wires apart?

To this question objection was made on the ground that it was immaterial, irrelevant and incompetent, and called for the opinion and conclusion of the witness, and on the further ground that it was indefinite. The witness answered:

A. One set of poles would be set far enough away from the other to allow four feet to intervene between the two sets of wires.

And he further testified that there is plenty of room on a 60-foot railroad right of way having but a single railroad track, to keep telegraph poles and railroad signal poles apart, even though they are both on the same side of the tracks, and also keep the wires far

enough apart so that they should not interfere with each other in any way. This testimony was given over objection on the ground that it was incompetent, irrelevant and immaterial and called for the opinion and conclusion of the witness. The witness then testified that in the event signal wires and telegraph wires were located on the same side of a railroad right of way, and it was difficult to have the two sets of wires on the same level and keep them 4 feet apart, the proper method of construction to keep the wires apart so that they should not interfere with each other by way of induction or conduction, would be to place one set of wires on poles higher than the poles carrying the other set of wires, and that that would be the customary mode of construction in such cases, to which testimony objection was made on the ground that it was incompetent, irrelevant and immaterial, called for the conclusion of the witness, and on the further ground that it had not been shown that the witness was qualified to testify to the question as asked.

The witness then testified that he had examined the contracts introduced in evidence in connection with his testimony hereinbefore referred to and that he had prepared a synopsis or table of the contents of these contracts on the following points: 1, the date of each contract; 2, its period; 3, the name or names of the railroad or railroads making the particular contract; 4, the name or names of the subsidiary telegraph company or companies of the Postal system entering into the contract;

5, the payment per mile for the right of way; 6, the points between which the contract applies; 7, the mileage between such points; 8, the distance required that poles be set away from the railroad track; 9, the distance within which the poles may be set from the outer edge of the right of way; 10, the distance the wires should be maintained away from the wires of the railroad company; and that he had checked the figures and distances in connection with this work. Objection was made on the ground that the testimony was incompetent, irrelevant and immaterial and assumed facts not proven. Over the same objection the table was then identified and marked in evidence as "Plaintiff's Exhibit 19."

On cross-examination, the witness testified that he had general charge of the construction and maintenance of the system of the Pacific Postal Telegraph-Cable Company and was General Superintendent of Plant of this company, but that he could not explain the legal connection between the Pacific Postal Telegraph-Cable Company and the Postal Telegraph Company, the complainant in this suit. That he was General Superintendent of Plant of the Postal Telegraph Company. He testified that by the "Postal Telegraph system" he referred to a land line system controlled by the Mackay Companies, and that by "The Mackay Companies" he referred to a group of telegraph companies owned by the Mackay Company, but that he could not name all of the Mackay Companies, although they have a telegraph company in nearly every state of the

United States. He testified that he had seen the right of way of the Southern Pacific Company mentioned in the complaint in this suit and that from riding over it he would estimate it to be 60 feet in width, although he had never measured it. That he can tell pretty nearly, but not exactly, from riding over a right of way, what its width is. That this particular right of way is fenced in some portions and unfenced in other portions, and that he can only use his judgment in estimating its width where it is fenced. That he is not an Electrical Engineer and has made no study of the effect of electricity from a scientific standpoint. That his duties have been simply the erection of poles and the stringing of wires along the routes of the Postal system for the past few years, and entirely these duties for the last three years. That when pole lines of the Postal Companies have been built along railroad rights of way in late years, they have been built in accordance with a contract or agreement previously made with such railroad. That prior to the last three years he had nothing to do with work in Oregon, and that he has had no work in connection with the installation of signal wires along the line of railroads and has made no study of the subject of signal wires. That his duties in connection with the negotiation of contracts for telegraph rights of way along railroad rights of way had consisted principally in deciding where the Postal Company wanted the line to go, and after that in having some of the officials of the Postal Company either see or write the officials of the railroad to learn what kind

of arrangements could be made. That indirectly he had to do with negotiations for these contracts in that if he sent a man to see the railroad officials he first instructed him what the Postal Company was willing to pay. That while he did not draft the contracts personally, he generally went over them. That he had never made a study of electricity as applied to telegraphy from a theoretical standpoint or from a scientific standpoint, and did not consider himself an expert in telegraphy when you get down to the electrical part of it. That his work has been mostly confined to the practical installation of lines, the setting of poles and to the commercial end of it.

RALPH H. OVERBAUGH, called as a witness on behalf of the plaintiff, was first duly sworn by the Commissioner, and testifies as follows:

DIRECT EXAMINATION BY MR. COOK:

Q. Where do you live?

A. Ridgefield Park, New Jersey.

Q. And you are an attorney?

A. Yes, sir.

Q. And you are employed in my office?

A. Yes, sir.

Q. And I am counsel for the Postal Telegraph Company?

A. Yes, sir.

Q. Will you state whether you have taken part in the preparation of the testimony in this case, and also attended the hearings, and whether you have seen to the adjournments?

A. I have.

Q. And you are familiar with the proceedings and conversations between the attorneys and parties relative to the conduct of this case?

A. Yes.

Q. What is this paper which I show you?

A. This is the contract submitted by the defendant in this action as being satisfactory to them. The red ink interlineations were made by the plaintiff.

Q. When you say the defendant you mean the Southern Pacific Company?

A. Yes, sir.

Q. And when you say that paper was satisfactory to them, what do you mean?

A. That was the contract as they drew it and submitted it to us, and stated that it was satisfactory to them, as they wanted it.

Q. In adjustment and settlement of all the differences between the parties to the suit?

A. That is right.

MR. BURLEIGH: It is understood that the same objections which I formerly made, apply to all this testimony.

Q. Do I understand then that the original type-writing of this document was as the Southern Pacific Company sent it to the Postal Telegraph Company as an adjustment of all the differences between the parties, this adjustment being satisfactory to the Southern Pacific Company, is that correct?

A. Yes, sir; that is correct.

Q. Then, as I understand your testimony, the Postal Telegraph Company, one of the parties to this suit, made a few suggestions in the way of modification, and those are written in this contract in red ink and in pencil?

A. Yes, sir.

MR. COOK: I offer the paper in evidence.

MR. BURLEIGH: It is subject to the same objection.

The same was marked Plaintiff's Exhibit No. 20, of this date.

Q. Have you prepared a clean copy of this proposed contract between the parties hereto, as presented to the Postal Telegraph Company by the Southern

Pacific Company? In other words, a clean copy, with red ink changes and pencil changes omitted which have been referred to?

A. I have.

Q. Will you present that clean copy?

A. I have it here. (Handing same to counsel.)

MR. COOK: I offer this paper in evidence.

MR. BURLEIGH: The same objection.

The same was marked Plaintiff's Exhibit No. 21, of this date.

Q. You may state whether you discussed with the counsel for the Southern Pacific Company, this proposed contract of adjustment, and the modifications thereon, suggested by the Postal Telegraph Company?

A. I have.

Q. Who was it with?

A. Mr. Esselstyn of 2 Rector street.

Q. Of this city?

A. Yes, sir.

Q. He is the counsel who appeared for the Southern Pacific Company in the previous hearings in the taking of this testimony?

A. Yes, sir, and conducted the cross-examination.

Q. You may state whether you handed to Mr. Esselstyn the form of contract for the two parties to execute in settlement of their differences?

A. I did.

Q. Is that it? (Handing witness paper.)

A. Yes.

Q. How does that differ from the two previous exhibits just put in evidence?

A. It differs from the first one in that the long tables therein set forth are omitted.

Q. Otherwise it is the same as the contracts which the parties herein discussed?

A. Yes, sir; that is correct.

Q. Will you state whether that form of contract was satisfactory to the counsel for the Southern Pacific Company?

A. He so stated.

MR. COOK: I offer this paper in evidence.

MR. BURLEIGH: Same objection.

The same was marked Plaintiff's Exhibit No. 22, of this date.

Q. If this contract was satisfactory to both parties, why was it not executed by the parties, and the litiga-

tion stopped? I wish you now merely to state what was stated to you by the counsel for the defendant, the Southern Pacific Company.

MR. BURLEIGH: Objected to on the same grounds as heretofore stated.

A. He stated to me it was due to the objection of the Western Union Telegraph Company; that they refused to permit the Southern Pacific Company to sign the contract in settlement of the differences involved in this action.

Q. Did he say anything about who was to continue the defense of this suit?

A. Yes.

Q. Who?

A. The general counsel for the Western Union Telegraph Company.

Q. Did he say as to what he, Mr. Esselstyn, had done with the papers that he had in his charge, in reference to the defense of this suit?

A. Yes, sir.

Q. What did he say?

A. Said he had sent the entire file to Mr. Fearons, the attorney for the Western Union Telegraph Company.

Q. Was the taking of the testimony thereupon adjourned from time to time in consequence of these negotiations and talks?

A. Yes, sir.

Q. And who signed the stipulation in behalf of the Southern Pacific Company in making those adjournments?

A. The last one was signed by Mr. Fearons.

Q. Is that the stipulation which was signed by Mr. Fearons? (Showing witness paper.)

A. Yes, sir.

Q. And it was also signed by myself as counsel for the Postal Telegraph Company?

A. Yes, sir.

MR. COOK: I offer this paper in evidence.

MR. BURLEIGH: Same objection as heretofore made.

The same was marked plaintiff's exhibit No. 23, of this date.

Q. Did you have any talk with Mr. Fearon's office in regard to the disposition of this suit?

A. Yes.

Q. What were you told by Mr. Fearons' office?

A. I was told by Mr. Fearon's office that the Western Union Telegraph Company would consent to the amicable arrangement that the Postal Telegraph Company wanted, and that we need not bother with any further preparation for continuing the hearings, or preparing a supplemental bill, which was spoken of.

Q. Did you take down what was said by Mr. Fearons' office?

A. I had a stenographer take it down in shorthand.

Q. You may read on the record what was taken down—read it into the record.

A. This is a verbatim copy of what Mr. Fearons' office stated to me over the telephone, as follows: "Mr. Fearons told me to tell you that it would not be necessary for you to do anything about that supplemental bill, and that within a few days, just as soon as he could get around to it, he would take the matter up. The Telegraph Company is going to consent to enter into the amicable arrangement with you, which you desire. If you don't hear from me within a few days, call me up about the latter part of this week."

Q. Who was that talk with in Mr. Fearons' office?

A. Mr. Burleigh.

Q. And Mr. Burleigh is the counsel who is conducting the examination today in behalf of the Southern Pacific Company?

A. He is.

Q. And he is in Mr. Fearons' office?

A. Yes, sir.

Q. His associate?

A. Yes, sir.

Q. You may state whether or not you were informed subsequently that the Western Union Telegraph Company objected to the stipulation you have testified to, making an adjustment of this case?

A. I was.

Q. And subsequently, the case had to go on?

A. That is correct.

Q. Will you state whether or not the supplemental bill referred to in the conversation you have read into the record, was to ascertain by what right the Western Union Telegraph Company was interfering in this matter and preventing these parties from adjusting their differences, as intended.

A. That was the nature of the bill.

MR. COOK: I think that is all with this witness.

CROSS EXAMINATION BY MR. BURLEIGH:

Q. Referring to the stenographic memorandum which you have testified to as having been taken of a telephonic conversation with Mr. Burleigh, I wish to ask if it is not the fact that in substance he used the following language, to wit: "Mr. Fearons told me to tell you that it would not be necessary for you to do anything about that supplemental bill, and that within a few days, just as soon as he could get around to it, he would take the matter up, and that in my opinion, the Telegraph Company is going to consent to enter into the amicable arrangement which you desire. And that if you did not hear from me within a few days to call me up about the latter part of this week."

A. That was not the language used. The words, "In my opinion" were not used.

Q. Was it not your understanding from these telephonic conversations that the fixing up of the matter was the individual opinion of the speaker and not the statement of Mr. Fearons?

A. I did not so understand.

Q. You have stated, Mr. Overbaugh, that Mr. Es-selstyn, representing the Southern Pacific Company, advised you that the Southern Pacific Company was prepared to enter into a certain contract which you had submitted—is that right

A. Yes, sir.

Q. And that he declined to enter into the contract again on account of the objections of the Western Union Telegraph Company,—is that correct?

A. Yes.

Q. Did he say or give you to understand upon what ground, if any, the Western Union would consent to the contract?

A. No.

Q. Did he or any other person inform you that if a provision was embodied in that contract to the effect that if it became necessary for the Western Union Telegraph Company to change its line or poles on account of the Postal Telegraph Company coming upon the Southern Pacific right of way, that it would consent to such contract, provided such changes so made necessary by the presence of the Postal Telegraph Company should be at the expense of the Postal Telegraph Company?

A. I was never so told by anybody.

Q. Is the Postal Telegraph Company ready to agree to a condition of that kind?

A. I am not prepared to answer that. The question has not been raised at all.

Q. Then, my understanding is that that condition has never been brought to your attention?

A. It has never been brought to my attention, that is correct.

Q. Mr. Esselstyn said nothing about it?

A. He did not.

RE-DIRECT EXAMINATION BY MR. COOK:

Q. This telegraph line of the Postal Telegraph Company is already in existence, is it not, on the right of way of the Southern Pacific Company?

A. Yes.

Q. And is on the opposite side of the tracks from the Western Union line?

A. I so understand it to be.

Q. And under the proposed contract, the Postal Telegraph Company at any time has to move the line from the railroad right of way and place it where it cannot interfere with the railroad's operation hereafter?

A. That is correct.

Q. Is there any possibility of its interfering with the Western Union line hereafter, by reason of changes made in the Postal line?

A. I don't see how it can, under the terms of that contract.

RE-CROSS EXAMINATION BY MR. BUR-
LEIGH:

Q. Is it the construction of this proposed contract by the Postal Telegraph Company that it gives the Postal Telegraph Company no right, by the removal or change of its line, to in any way interfere with the Western Union line on the Southern Pacific right of way?

A. They are on opposite sides of the railroad row, and if any change is made necessary, the Postal agrees to give up the right of way under their contract.

Q. Is it the understanding of the Postal Telegraph Company that if any change is made which necessitates a corresponding change on the part of the Western Union Telegraph Company, that that change shall be at the expense of the Postal Telegraph Company?

MR. COOK: I will have to object to that on the ground that the proposed contract which has been introduced in evidence itself is the best evidence on that point. I acknowledge that the suggestion of counsel for the defendant, that the same objection would apply to one of my questions, is correct.

A. I don't know what the understanding of the Postal Telegraph Company is. The contract speaks for itself.

The foregoing condensed statement of the testimony in this cause is hereby approved..

CHAS. E. WOLVERTON,
Judge.

(Endorsed) Condensed Statement.
Filed March 16, 1914.

A. M. CANNON,
Clerk U. S. District Court.

"PLAINTIFF'S EXHIBIT No. 19"

Date of Contract	Period of Contract	Name of Road	Contract with	Payment per mile	Points between	Mileage	Distance required that poles be set from track	Distance within which poles may be set from outer edge of right of way	Distance wires shall be maintained from those of railroad company
Feb. 28-11	Perpetual	Kansas City Southern Ry.	Mackay Telegraph & Cable Co. (Tex.), and Commercial Telegraph & Cable Co. of Louisiana..\$10		Operates trains over tracks and owns most of stock of other two railroads mentioned in contract, Lake Charles to De Quincy, La., thence southwesterly to the State Line between states of Louisiana and Texas, southerly from said state line to Port Arthur, Texas (through Beaumont)	89.1	25 ft	4 ft	
		Kansas City, Shreveport & Gulf Ry. Co.							
		Texarkana and Fort Smith Ry. Co....							

Distance required that poles be set from track

Distance within which poles may be set from outer edge of right of way

Distance wires shall be maintained from those of railroad company

Mileage

Points between

Payment per mile

(Contract with

Name of Road

Period of Contract

Date of Contract

Oct. 28-11 Perpetual St. Louis Southwest-

ern Ry. Mackay Telegraph &

Cable Co. (Arkan-

sas)\$10 Argenta, Ark.-Pine Bluff,

, Ark. 54.6

8 ft 5 ft 4 ft

Sept. 18-11 Perpetual Missouri, Kansas &

Texas Ry. Postal Telegraph-

Cable Co. (Okla.) \$10 McAlester, through Musko-

, gee to Vinita, Okla....125.2

8 ft 5 ft 5 ft

Apr. 28-11 Perpetual Chicago, Rock Island

& Gulf Ry. Co... Mackay Telegraph &

Cable Co. (Texas) \$10 Ft. Worth-Dallas, Texas. 34

8 ft 5 ft 4 ft

Distance required that
poles be set from track
Distance within which
poles may be set from out-
er edge of right of way
Distance wires shall be
maintained from those of
railroad company

Date of Contract	Period of Contract	Name of Road	Contract with	Payment per mile	Points between	Mileage	Distance required that poles be set from track	Distance within which poles may be set from out- er edge of right of way	Distance wires shall be maintained from those of railroad company
Nov. 3-10	Perpetual	Atchison, Topeka & Santa Fe Ry. Co. The Kansas Postal Telegraph - Cable Co. ....	.....\$10	Wichita to Kansas-Okla- homa State Line.....	55.6	8 ft.	5 ft.	4 ft.	
Nov. 3-10	Perpetual	Atchison, Topeka & Santa Fe Ry. Co. Postal Telegraph- Cable Co. (Okla.).	.....\$10	Kansas-Oklahoma State Line to Purcell, Okla.....	149.5	8 ft.	5 ft.	4 ft.	
Nov. 3-10	Perpetual	Gulf, Colorado & Santa Fe Ry.....	Postal Cable Co. (Okla.)	.....\$10	Purcell to Okla.—Texas State Line	100	8 ft.	5 ft.	4 ft.

Distance required that poles be set from track

Distance within which poles may be set from outer edge of right of way

Distance wires shall be maintained from those of railroad company

Points between

Mileage

Payment per mile

Contract with

Name of Road

Period of Contract

Date of Contract

Nov. 3-10 Perpetual Gulf, Colorado & Santa Fe Ry.... Texas Teleg. Co....\$100kla.—Texas State Line to Fort Worth..... 72

Jan. 21-11 Perpetual Gulf, Colorado & Santa Fe Ry.... Texas Teleg. Co....\$10ft. Worth-Galveston, Cleburne-Dallas, Alvin-Houston424

Aug. 17-11 Perpetual Atchison, Topeka & Santa Fe Ry.... Postal Telegraph-Cable Co. (California Corporation)\$10San Dimas - San Bernardino; San Bernardino-Barstow110

8 ft 5 ft 4 ft

8 ft 5 ft 4 ft

8 ft 5 ft 4 ft

Distance wires shall be maintained from those of railroad company

Distance within which poles may be set from outer edge of right of way

Distance required that poles be set from track

Mileage

Points between

Payment per mile

Contract with

Name of Road

Period of Contract

Date of Contract

Nov. 29-11 Perpetual Texas & Pacific Ry.
Co.

Com'cial Telegraph
& Cable Co. of
Louisiana

\$10 Point on State Line between Ark. and La. just south of Kiblah, Ark., to the crossing of Beaumont, Sour Lake & Western Ry., between For- doche and Livonia (via Natchitoches) 251

main 20 ft
side
track 10 ft.

main 20 ft
side
track 10 ft.

Nov. 29-11 Perpetual Texas & Pacific Ry.
Co.

Mackay Telegraph &
Cable Co. (Texas) \$10 Sherman and Texarkana. 151

Mileage

Distance required that poles be set from track	Distance within which poles may be set from outer edge of right of way	Distance wires shall be maintained from those of railroad company
--	--	---

Date of Contract	Period of Contract	Name of Road	Contract with	Payment per mile	Points between	Mileage
Nov. 29-11	Perpetual	Texas & Pacific Ry.				
			Co.			
			Mackay Telegraph & Cable Co. (Ark.)	\$10	Texarkana and a point on State Line between Arkansas and Louisiana	just south of Kiblah... 33

PLAINTIFFS' EXHIBIT 19.

Filed October 10, 1913.

A. M. CANNON,
Clerk U. S. District Court.

"Plaintiff's Exhibit No. 21. July 9, 1912."

KNOW ALL MEN BY THESE PRESENTS.

That the Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, having an office and place of business and authorized to transact business in the State of Oregon and elsewhere, as party of the first part (hereinafter called the Southern Company), and the Postal Telegraph Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in said State of Oregon, as party of the second part (hereinafter called the Postal Company), and the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in the State of Oregon, as party of the third part (hereinafter called the Oregon Company), have made and entered into the following agreement, to wit:

FIRST: That the Southern Company and the Oregon Company, for and in consideration of the premises and the covenants and agreements hereinafter contained to be fulfilled and performed by the respective parties hereto, hereby grant unto the Postal Company the right to maintain and operate along and upon those certain portions of the right of way of the Oregon Company between Portland and Myrtle Creek in the State of Oregon hereinafter particularly described, 1694 tele-

graph poles with cross-arms and wires thereto attached, belonging to said Postal Company and now located upon said right of way; also the right to maintain and operate 3672 cross-arms with telegraph wires thereon extending and suspended over those portions of the right of way of the Oregon Company hereinafter described, and attached to said telegraph poles of said Postal Company which are now located adjacent to and without said right of way of the Oregon Company now leased to the Southern Company, together with the right to reconstruct, or renew said poles and cross-arms in their present locations, and to string wires thereon and to occupy said portions of said right of way for the purposes of the Postal Company, subject to the terms, conditions and provisions hereinafter contained.

SECOND: The consideration therefor agreed to be paid by the Postal Company is at the rate of Ten Dollars per mile of said right of way where used or occupied by the Postal Company, payable to the Southern Company on the execution and delivery of these presents and computed by the parties to be the sum of \$1,423.25.

THIRD: That upon the payment of said sum hereinbefore stated by the Postal Company to the Southern Company, it is agreed by the parties hereto that the Postal Company has and shall have, and be let into, the possession, operation and control of the said portion of said right of way for telegraph and telephone purposes and the re-construction, maintenance and operation of

its telegraph line as now located over and along said right of way as hereinbefore described; that a particular description of the said telegraph line to be rebuilt and maintained by the said Postal Company over and along said right of way is as follows, to wit:

(Here follows description.)

FOURTH: It is further covenanted and agreed by the Postal Company that the said telegraph line, when and as re-constructed, shall be so re-constructed as to consist of a single line of poles not less than twenty nor more than twenty-five feet in length, including length underground, planted firmly in the ground at a depth of not less than four feet. Said telegraph line shall be re-constructed according to the most improved methods of construction. At highway crossings, or where obstructions exist, said poles shall be of such height as required by law, or by the physical conditions existing at such places, or to protect other wires or structures rightfully upon said right of way. Said poles shall be set one hundred and fifty feet apart, making a total of thirty-five poles to the mile, excepting at sharp angles, where they may be set not less than seventy-five feet apart, and around curves, where they may be set one hundred and seventeen to one hundred and thirty-one feet apart, with cross-arms at or near the top of said poles. Said cross-arms shall not exceed ten feet in length and shall be fastened about the middle of the cross-arms to the pole, upon which cross-arms there shall be attached insulators, and upon which cross-arms

there shall be strung, from pole to pole, a sufficient number of wires to transmit speedily and properly all the business intrusted to the Postal Company for transmission by the United States Government and the public.

FIFTH: The Postal Company further covenants and agrees that wherever it now is or hereafter becomes necessary to cross the railroad track of said railroad the said poles shall be of such height above the ground and the wires strung so high as to prevent any interference with the operation and conduct of its business, and so as not to endanger the life or limb of its employees or other persons having occasion to be upon said right of way. Each of said crossings shall be constructed, maintained and operated subject to the terms and conditions contained in the usual form of wire crossing agreement then used by the Southern Company, which agreement shall be executed by both the Postal Company and the Southern Company.

SIXTH: If at any time the Southern Company or the Oregon Company, or either of them, need any portion of said right of way where said poles and lines are strung, then, in such event, the Postal Company, upon reasonable notice, at its own expense shall remove the same to some other point or points upon said right of way that may be designated by the Southern Company and the Oregon Company, or either of them. And, in the event that it shall become necessary in the operation and maintenance of the railroad system of the Southern

Company or the Oregon Company, at any point between Portland, Oregon, and the Oregon and California State line, or any point mentioned herein, to use the entire right of way for railroad purposes, or to use any part thereof occupied by the Postal Company, then and in that event, upon reasonable notice, the Postal Company shall, at its own expense, remove its poles and wires from said right of way at the point or points designated by the President of the Southern Company as necessary as aforesaid.

SEVENTH: It is further covenanted and agreed by the Postal Company that said Postal Company shall not attach or maintain wires or fixtures of any kind to any bridges, trestles, buildings or structures of the Southern Company or the Oregon Company or the Western Union Telegraph Company, and shall not erect any of its poles upon any of the embankments of the Southern Company or the Oregon Company, and shall not place or maintain its poles nearer than five feet to the rim of cuts, and shall only occupy such portions of the said right of way of said Railroad Companies as are now occupied by said Postal Company, and as are not being used by the said Southern Company or the Oregon Company for railroad purposes, or such portions thereof as are not being used by the Western Union Telegraph Company.

EIGHTH: The Postal Company further covenants and agrees that its telegraph line shall be so constructed that it will not come in contact with or interfere with any telegraph line already constructed on the said

right of way of the Southern Company and the Oregon Company, and it is further agreed that the Postal Company shall in all manner comply with the statutes of the State of Oregon in the reconstruction of its line of telegraph aforesaid, and with any decree that may be entered in that certain suit now pending in the District Court of the United States for the District of Oregon wherein the Postal Telegraph Company, a corporation, is plaintiff, and the Southern Pacific Company, a corporation, is defendant, and known in said Court as No. 3829.

NINTH: It is further agreed by and between the parties hereto that the Postal Company, upon the payment of said sum agreed to be paid, may enter upon the right of way of the Southern Company and the Oregon Company as aforesaid, and reconstruct its telegraph line as set forth herein, but that the poles of said Postal Company erected and maintained upon the right of way of the Southern Company and the Oregon Company shall not be placed and/or/maintained within falling distance of any telegraph line now on said right of way, except that wherever by the topography of the country, highways, buildings or lack of width of the right of way, or the nearness of the existing telegraph line to the easterly or westerly line of said right of way, the poles of the telegraph line of the Postal Company, by reason of the height or otherwise, shall be within such falling distance, then and in that event, said poles of the Postal Company shall be guyed in accordance with improved

methods of construction. It is hereby expressly agreed, everything to the contrary herein contained, notwithstanding, that in the event the Postal Company shall remove any of its poles, cross-arms or wires from said right of way of the Oregon Company, that such removal shall constitute an abandonment by the Postal Company of any and all rights it may have acquired in and to such portion of said right of way from which said poles, cross-arms or wires were so removed.

TENTH: It is further understood and agreed by and between the parties hereto that this agreement shall be the basis of a decree in favor of the Postal Company in the above entitled case and against the Southern Company or the Oregon Company or the Western Union Telegraph Company if added as parties to said cause, but that the Postal Company shall take no decree for costs or disbursements in said cause, and that upon the entry of said decree with a copy of this agreement therein, said Court may enter a decree in accordance with said agreement and subject to its terms and provisions, appropriating to the Postal Company so much of said right of way as is hereinbefore specifically described for its use as a telegraph company subject to the terms and provisions of this agreement, with the right of either party to this agreement to apply to said Court for the enforcement of said decree and this agreement.

ELEVENTH: This agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto
have caused this instrument to be executed in six parts
by their officers thereunto duly authorized, this
day of, A. D. 1912.

Executed in the presence of us:

As to the Southern Pacific Co.

.....
.....

SOUTHERN PACIFIC COMPANY,

By, Pres.

And, Secy.

As to Postal Tel. Co.

.....
.....

POSTAL TELEGRAPH COMPANY,

By, Pres.

And, Secy.

As to the Oregon and California
Railroad Company:

.....
.....

OREGON AND CALIFORNIA RAIL-
ROAD COMPANY,

By, Pres.

And, Secy.

Western Union Telegraph Company hereby consents to the foregoing agreement this.....day of....., 1912.

WESTERN UNION TELEGRAPM COMPANY,

By

Filed October 10, 1913.

A. M. CANNON,

Clerk U. S. District Court.

PLAINTIFF'S EXHIBIT NO. 22, 7/9/1912.

NOTE 1.

(Where italics are used in this exhibit, in the original document the same words are interlined in red ink, and the words lined out are also lined out in the original.)

KNOW ALL MEN BY THESE PRESENTS.

THAT the Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, having an office and place of business and authorized to transact business in the State of Oregon and elsewhere, as party of the first part (hereinafter called the Southern Company), and the Postal Telegraph Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in said State of Oregon, as party of the second part, (hereinafter called the Postal Company), and the Oregon and California Railroad Company, a corporation duly organized and existing under the laws of the State of Oregon, having an office and place of business and authorized to transact business in the State of Oregon, as party of the third part (hereinafter called the Oregon Company), have made and entered into the following agreement, to wit:

FIRST: That the Southern Company and the Oregon Company, for and in consideration of the premises and the covenants and agreements hereinafter contained

to be fulfilled and performed by the respective parties hereto, hereby grant unto the Postal Company the right to maintain and operate along and upon those certain portions of the right of way of the Oregon Company between Portland and Myrtle Creek *and between Myrtle Creek and Ashland* in the State of Oregon ~~hereinafter particularly described, 1694~~ telegraph poles with cross-arms and wires *now* thereto attached, *or to be attached*, belonging to said Postal Company *as now* located upon said right of way; also the right to maintain and operate ~~3672~~ cross-arms with telegraph wires thereon extending and suspended over those portions of the right of way of the Oregon Company ~~hereinafter~~^{above} described, and attached to said telegraph poles of said Postal Company *as now* located adjacent to and without said right of way of the Oregon Company now leased to the Southern Company, together with the right to reconstruct or renew said poles and cross-arms in their present locations, and to *attach cross-arms thereto and* string wires thereon and to occupy said portions of said right of way for the purposes of the Postal Company, subject to the terms, conditions and provisions hereinafter contained.

SECOND: (1) The consideration therefor agreed to be paid by the Postal Company is at the rate of Ten Dollars per mile of said right of way where used or occupied by the Postal Company, payable to the Southern Company *as hereinafter provided* ~~on the execution and delivery of these presents and computed by the parties to be the sum of \$1,423.25.~~

(2) *The Postal Company shall at once begin and proceed with the work of reconstruction of said poles and wires, and as the work progresses surveys shall be made showing the locations of the poles on said right of way and of poles adjacent to said right of way supporting cross-arms that overhang the right of way. The mileage of said right of way used or occupied by the Postal Company shall then be computed by the Postal Company by counting the said poles and dividing the number by 35. Said payment at the said rate on the mileage so computed is to be made by the Postal Company within thirty days after receipt of bills therefor based upon said surveys and rendered by the Southern Company.*

THIRD: ~~That upon the payment of said sum hereinbefore stated by the Postal Company to the Southern Company,~~ It is agreed by the parties hereto that the Postal Company has and shall have, and be let into the possession, operation and control of the said portion of said right of way for telegraph and telephone purposes and the reconstruction, maintenance and operation of its telegraph line as now located over and along *and adjacent to* said right of way as hereinbefore described; ~~that a particular description of the said telegraph line to be rebuilt and maintained by the said Postal Company over and along said right of way is as follows, to wit:~~

FOURTH: It is further covenanted and agreed by the Postal Company that the said telegraph line, when and as reconstructed, shall be so reconstructed as

to consist of a single line of poles set not less than twenty nor more than twenty-five feet in length, including length underground, planted firmly in the ground at a depth of not less than four feet. Said telegraph line shall be reconstructed according to the most improved methods of construction. At highway crossings, or where obstructions exist, said poles shall be of such height as required by law, or by the physical conditions existing at such places, or to protect other wires or structures rightfully upon said right of way. Said poles shall be set one hundred and fifty feet apart, making a total of thirty-five poles to the mile, excepting at sharp angles, where they may be set not less than seventy-five feet apart, and around curves, where they may be set one hundred and seventeen to one hundred and thirty-one feet apart, with *one or more* cross-arms at or near the top of said poles. Said cross-arms shall not exceed ten feet in length, and shall be fastened about the middle of the cross-arms to the pole, upon which cross-arms there shall be attached insulators, and upon which cross-arms there shall be strung, from pole to pole, a sufficient number of wires to *transact, transmit speedily and properly* ~~all the business intrusted to the of the Postal Company for transmission by the United States Government and the public.~~ *The Postal Company is hereby given the right to replace its present cross-arms on said poles by cross-arms of any length, not to exceed ten feet, and to add to said cross-arms from time to time, but in no case are any cross-arms to exceed ten feet in length.*

FIFTH: The Postal Company further covenants and agrees that wherever it now is or hereafter becomes necessary to cross the railroad track of said railroad the said poles shall be of such height above the ground and the wires strung so high as to prevent any interference with the operation and conduct of its business, and so as not to endanger the life and limb of its employees or other persons having occasion to be upon said right of way. Each of said cross-arms shall be constructed, maintained and operated subject to the *reasonable* terms and conditions contained in the usual form of wire crossing agreement then used by the Southern Company, which agreement shall be executed by both the Postal Company and the Southern Company, *without consideration other than the considerations of this agreement.*

SIXTH: If at any time the Southern Company or the Oregon Company, or either of them, need any portion of said right of way where said poles and lines are strung, then, in such event, the Postal Company, upon reasonable notice, at its own expense shall remove the same to some other point or points upon said right of way that may be designated by the Southern Company and the Oregon Company, or either of them. And, in the event that it shall become necessary in the operation and maintenance of the railroad system of the Southern Company or the Oregon Company, at any point between Portland, Oregon, and the Oregon and California State line, or any point mentioned herein, to use the entire right of way for railroad purposes, or to use any

part thereof occupied by the Postal Company, then and in that event, upon reasonable notice, the Postal Company shall, at its own expense, remove its poles and wires from said right of way at the point or points designated by the President of the Southern Company as necessary as aforesaid.

SEVENTH: It is further covenanted and agreed by the Postal Company that said Postal Company shall not attach or maintain wires or fixtures of any kind to any bridges, trestles, buildings or structures of the Southern Company or the Oregon Company or of the Western Union Telegraph Company, and shall not erect any of its poles upon any of the embankments of the Southern Company or the Oregon Company, and shall not place or maintain its poles nearer than five feet to the rim of cuts, and shall only occupy such portions of the said right of way of said Railroad Companies as are now occupied by said Postal Company, *except as provided in Par. Sixth and except that the number of cross-arms not exceeding ten feet in length may be increased at any time and from time to time, thus adding to the number of existing overhangs without further consideration*, and as are not being used by the said Southern Company or the Oregon Company for railroad purposes, or such portions thereof as are not being used by the Western Union Telegraph Company.

EIGHTH: The Postal Company further covenants and agrees that its telegraph line shall be so constructed that it will not come in contact with or inter-

fere with any telegraph line already constructed on the said right of way of the Southern Company and the Oregon Company, and it is further agreed that the Postal Company shall in all manner comply with the statutes of the State of Oregon in the reconstruction of its line of telegraph aforesaid, and with any decree that may be entered in that certain suit now pending in the District Court of the United States for the District of Oregon, wherein the Postal Telegraph Company, a corporation, is plaintiff, and the Southern Pacific Company, a corporation, is defendant, and known in said Court as No. 3829.

NINTH: It is further agreed by and between the parties hereto that the Postal Company, ~~upon the payment of said sum agreed to be paid~~, may enter upon the right of way of the Southern Company and the Oregon Company as aforesaid, and reconstruct its telegraph line as set forth herein, but that the poles of said Postal Company erected and maintained upon the right of way of the Southern Company and the Oregon Company shall not be placed and/or/maintained within falling distance of any telegraph line now on said right of way, except that wherever by the topography of the country, highways, buildings or lack of width of the right of way, or the nearness of the existing telegraph line to the easterly or westerly line of said right of way, the poles of the telegraph line of the Postal Company, by reason of the height or otherwise, shall be within such falling distance, then and in that event, said poles of the Postal Company

shall be guyed in accordance with improved methods of construction. It is hereby expressly agreed, everything to the contrary herein contained notwithstanding, that in the event the Postal Company shall remove any of its poles, cross-arms or wires from said right of way of the Oregon Company, *except for the purpose of rebuilding or repairing*, that such removal shall constitute an abandonment by the Postal Company of any and all rights it may have acquired in and to such portion of said right of way from which said poles, cross-arms or wires were so removed.

TENTH: It is further understood and agreed by and between the parties hereto that this agreement shall be the basis of a decree in favor of the Postal Company in the above entitled case and against the Southern Company or the Oregon Company or the Western Union Telegraph Company if added as parties to said cause, but that the Postal Company shall take no decree for costs or disbursements in said cause, and that upon the entry of said decree with a copy of this agreement therein, said Court may enter a decree in accordance with said agreement and subject to its terms and provisions, appropriating to the Postal Company so much of said right of way as is hereinbefore specifically described for its use as a telegraph company subject to the terms and provisions of this agreement, with the right of either party to this agreement to apply to said Court for the enforcement of said decree and this agreement.

ELEVENTH: This agreement shall be binding upon the parties hereto and upon their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed in six parts by their officers thereunto duly authorized, this
day _____, A. D. 1912.

Executed in the presence of us:

As to Southern

Pacific Company:

.....
.....

SOUTHERN PACIFIC COMPANY,

By President.

and Secretary.

As to the Postal

Telegraph Company:

.....
.....

POSTAL TELEGRAPH COMPANY,

By President.

and Secretary.

As to Oregon and

California Railroad Co.:

.....
.....

OREGON AND CALIFORNIA RAIL-
ROAD COMPANY,

By President.

and Secretary.

Western Union Telegraph Company hereby con-
sents to the foregoing agreement this day of
 , 1912.

WESTERN UNION TELEGRAPH
COMPANY,

By

Filed October 10, 1913.

A. M. CANNON,

Clerk U. S. District Court.

PLAINTIFF'S EXHIBIT No. 23. 7/9/1912.
IN THE CIRCUIT COURT OF THE UNITED
STATES,

For the District Court of Oregon.

Postal Telegraph Company,)
	Plaintiff,)
against)
Southern Pacific Company,)
	Defendant.)

IT IS HEREBY STIPULATED that the taking of depositions in New York City, New York, in the above entitled case be and the same hereby is adjourned from June 18th, 1912, to July 9th, 1912, at ten o'clock in the forenoon of the said day, at the same hour and place before George Fritsche, Notary Public, at his office, No. 253 Broadway, Borough of Manhattan, New York City, New York.

Dated June 8th, 1912.

O. W. POWERS,
THOS. MARIONEUX,
ROGER B. SINNOTT,
LORING K. ADAMS,

Solicitors for Complainant.

WILLIAM W. COOK,
Of Counsel.

Western Union Telegraph Co.

GEO. H. FEARONS,
Of Counsel for Defendant.

Filed October 10, 1913.

A. M. CANNON,
Clerk U. S. District Court.

PLAINTIFF'S EXHIBIT X.

AGREEMENT

between the

GULF, COLORADO AND SANTA FE RAIL-
WAY COMPANY

and the

TEXAS TELEGRAPH COMPANY.

Relating to telegraph pole line on right of way between the Texas-Oklahoma State line and Fort Worth, Texas.

Dated this third day of November, 1910.

AGREEMENT, made this third day of November, 1910, between the GULF, COLORADO AND SANTA FE RAILWAY COMPANY, a corporation organized under the laws of Texas (hereinafter called the "Gulf Company"), party of the first part, and the TEXAS TELEGRAPH COMPANY, a corporation organized under the laws of Texas (hereinafter called the "Texas Company"), party of the second part.

WITNESSETH:

WHEREAS, the Gulf Company owns and operates a line of railway upon its right of way, a part of which extends between the Texas-Oklahoma State Line,

southerly to Fort Worth, Texas, and the Texas Company desires to secure the right and permission of placing and maintaining on such right of way a line of poles, wires, and appurtenances for telegraph and telephone purposes:

NOW, THEREFORE, IT IS UNDERSTOOD
AND AGREED AS FOLLOWS:

Article 1.

In consideration of the covenants of the Texas Company and the faithful performance of the same and subject to the conditions hereinafter contained, the Gulf Company hereby gives and grants to the Texas Company the permission and right to construct and at all times thereafter maintain, repair, reconstruct and operate for telegraph and telephone purposes a line of poles, wires and the appurtenances and appliances necessary thereto for said purposes upon and along the right of way now occupied or as hereafter located and used by the Gulf Company between the Oklahoma-Texas State Line and Fort Worth, Texas, a distance of 72 miles, more or less; provided, such pole line, wires, and appliances be located and maintained by said Texas Company as hereinafter provided.

Article II.

In consideration of the foregoing grant and permission the Texas Company covenants and agrees as follows:

Section 1. That it will pay to the Gulf Company from time to time, as fast as the pole line is completed, the sum of ten dollars (\$10.00) for each mile so constructed.

Section 2. That said pole line shall be constructed parallel to the rails of the Gulf Company's main track, but shall at all times be placed, replaced and maintained on the opposite side of the track from the Gulf Company's telegraph line as the same now is or may hereafter be located or relocated.

Section 3. That it will not place or maintain any pole within eight (8) feet of the nearest rail of any track of the Gulf Company as now or hereafter located or constructed, nor more than five (5) feet from the right of way line of the Gulf Company, without the written permission of the Telegraph Manager of the Gulf Company first obtained; that should any pole be located or maintained within eight (8) feet of the nearest rail of any track of the Gulf Company hereafter constructed, it will, without cost or expense to the Gulf Company, promptly remove the same upon request so as to be thereafter maintained a distance of at least eight (8) feet from such track; that its wires shall at all times be maintained above the ball of the rail in any track of the Gulf Company a distance of at least twenty-five (25) feet, and from the wires of the Gulf Company a distance of at least four (4) feet.

Section 4. That said pole line, wires, and appliances

shall be constructed and maintained in the best and most approved manner as regards depth to which the poles are set in the ground, affixing of guy wires and other appliances, and shall be constructed, repaired, relocated, reconstructed, maintained, used and operated as in this agreement provided, and in such manner as not to interfere with the operation, use, repair, or maintenance of the line of railroad of the Gulf Company, the operation of its trains or the conduct of its business thereon, and so as not to endanger or jeopardize the safety of servants, agents, passengers or licensees of the Gulf Company, or its property, or that in its custody; and in case of injury to or death of any such persons, or to or of the employees of said Texas Company, or other persons, or damage to or destruction of the property of said Gulf Company, or that in its custody or under its control, or of other persons, due to, caused, or occasioned by reason of the construction, maintenance, use or operation of said pole line, or its fixtures or appliances, or by reason of the neglect or failure of the Texas Company to construct, use, and maintain the same as in this agreement provided, said Texas Company shall indemnify and hold harmless said Gulf Company against such loss or damage or liability therefor and against claims and actions due to, arising or growing out of the same, and costs and expenses incident to or incurred in defending such actions and will defend all such actions when and if called upon by the Gulf Company, and will promptly pay to said Gulf Company the amount of any judg-

ment rendered in any such action and expenses reasonably and necessarily incurred by the Gulf Company in defending the same.

Section 5. That the pole line aforesaid shall be constructed, repaired, relocated, reconstructed, maintained, and operated at all times in accordance with the reasonable regulations and requirements of the Gulf Company regarding the same.

Section 6. That in the event said pole line or appliances shall in any way or at any time interfere with the relocation or construction by the Gulf Company of any track, building, or other structure, or the opening of any gravel pit, or rock quarry, or the removing of any material from the right of way, or with any other use the Gulf Company may desire to make of its premises, it, the Texas Company, will at its sole cost and expense forthwith remove the said pole line and appliances to such other location as may be selected or designated by the Gulf Company.

Section 7. In case said Texas Company shall not promptly remove and relocate any pole or other appliances as in this contract provided, said Gulf Company may, after reasonable demand, take down or remove such pole or appliances and said Texas Company shall promptly pay to said Gulf Company the cost and expense of so doing.

Article III.

Should said Texas Company neglect or refuse, after thirty (30) days' written demand by the Gulf Company, to perform any of the foregoing covenants or conditions on its part to be performed, then said Gulf Company may, at its option, by notice in writing given or mailed to the Texas Company at its last known place of address, revoke the license, grant, or permission hereinabove given, and require said Texas Company to remove such pole line and appliances from said right of way, but such revocation shall not be deemed or held to release said Texas Company from any obligation hereinbefore contained to indemnify the Gulf Company as hereinbefore provided or to pay any judgment rendered in any action as hereinbefore provided and costs and expenses incurred in defending the same, or any other sums for which said Texas Company may be liable as hereinbefore provided.

This agreement and the provisions thereof shall be binding upon and inure in favor of the lessees, successors and assigns of the respective parties hereto.

IN WITNESS WHEREOF the parties hereto have caused these presents to be executed in duplicate by their respective officers thereunto duly authorized and their respective seals affixed the day and year first above written.

GULF, COLORADO AND SANTA
FE RAILWAY COMPANY,

By E. P. Ripley, Its President.

Attest:

A. C. Torbert,
Secretary.

TEXAS TELEGRAPH COMPANY

By E. J. Nally, its Vice-President.

Attest:

Wm. B. Dunn,
Acting Secretary.

State of Illinois)
County of Cook) ss.

On the 25th day of November, 1910, before me personally came E. P. Ripley, to me known, who, being by me duly sworn, did depose and say, that he is the President of the Gulf, Colorado and Santa Fe Railway Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

AGNES K. DONOHUE,

Notary Public.

State of New York,)
County of New York.) ss.

On the 3rd day of November, 1910, before me personally came Edward J. Nally, to me known, who being by me duly sworn, did depose and say, that he is the Vice-President of the Texas Telegraph Company, the cor-

poration described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

HENRY A. VAN DER PAAUWERT,

Notary Public.

WHEREAS the Postal Telegraph-Cable Company, a corporation organized under the laws of the State of Connecticut, owns or controls the capital stock of the Texas Telegraph Company, a corporation organized under the laws of Texas; and

WHEREAS, the Gulf, Colorado and Santa Fe Railway Company agreed with the undersigned to enter into the foregoing contract with the Texas Telegraph Company of Texas upon the express understanding and in consideration of the covenant and guaranty herein set forth.

NOW, THEREFORE, in consideration of the entering into of the aforesaid agreement by said Gulf, Colorado and Santa Fe Railway Company with the Texas Telegraph Company of Texas, which it is hereby admitted and acknowledged was entered into by said Gulf, Colorado and Santa Fe Railway Company in consideration of the covenant and agreement of the undersigned herein set forth, the said Postal Telegraph-Cable Company of Connecticut for itself, its successors and assigns,

hereby covenants and agrees to and with said Gulf, Colorado and Santa Fe Railway Company, its successors and assigns, that it will at all times guarantee the performance of and make good each and all of the covenants of said Texas Telegraph Company of Texas in the aforesaid agreement set forth, and will promptly pay to said Gulf, Colorado and Santa Fe Railway Company, upon demand, any and all sums which may become due or payable under the aforesaid agreement from said Texas Telegraph Company of Texas to said Gulf, Colorado and Santa Fe Railway Company, and will at all times indemnify and hold harmless said Gulf, Colorado and Santa Fe Railway Company against all loss, damage and liability and claims therefor due to, caused, or growing out of any act, neglect, or omission of said Texas Telegraph Company of Texas in respect to any of the matters or things in the aforesaid agreement provided.

IN WITNESS WHEREOF the undersigned Postal Telegraph-Cable Company of Connecticut has caused these presents to be executed by its officers thereunto duly authorized and its seal to be affixed this 3rd day of November, 1910.

POSTAL TELEGRAPH-CABLE COMPANY

(of Connecticut)

By C. C. Adams, its Vice-President.

Attest:

J. O. Stevens,

Secretary.

State of New York)
County of New York)ss.

On the 3rd day of November, 1910, before me personally came Charles C. Adams, to me known, who, being by me duly sworn, did depose and say, that he is the Vice-President of the Postal Telegraph-Cable Company of Connecticut, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

HENRY A. VAN DER PAAUWERT,

Notary Public.

Filed October 10, 1913.

A. M. CANNON,

Clerk U. S. District Court.

PLAINTIFFS' EXHIBIT Y.

KNOW ALL MEN BY THESE PRESENTS,

That The Pacific Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of New York, for a valuable consideration moving from the Postal Telegraph-Cable Company, a corporation duly organized and existing under the laws of the State of Oregon, the receipt whereof is hereby acknowledged, has remised, released and forever quit-claimed, and by these presents doth for itself, its successors and assigns, remise, release, and forever quit-claim unto the said Postal Telegraph-Cable Company, its successors and assigns forever, all such right, title, interest, property, possession, claim or demand as it has or ought to have in or to all those certain lines of telegraph described as follows:

A line from the state line between California and Oregon beginning at a point near Colestine, Jackson County, Oregon, running thence in a northerly direction through the counties of Jackson, Josephine, Douglas, Lane, Linn, Marion, Clackamas, Multnomah and Columbia, via Ashland and Medford, Jackson County, Grants Pass, Josephine County, Roseburg, Douglas County; Cottage Grove and Eugene, Lane County; Albany, Linn County; Salem, Marion County; Oregon City, Clackamas County; Portland, Multnomah County, to the state line between Washington and Oregon at a point near Goble, Columbia County, Oregon, a distance of about three hundred sixty-four and three-

fourths ($364\frac{3}{4}$) miles;

A line beginning at a point near Goble, Columbia County, Oregon, running thence northwesterly and westerly through the counties of Columbia and Clatsop, via Rainier, Columbia County; and Knappa, Clatsop County, to Astoria, Clatsop County, a distance of about fifty-six (56) miles;

Together with all the rights, title, interest and claim of the said Pacific Postal Telegraph-Cable Company of, in and to any rights of way under and in pursuance of which said telegraph lines were erected and maintained, and all fixtures, instruments, switchboards, batteries, office furniture, and all other appurtenances thereto belonging or in any way pertaining, subject, however, to a certain mortgage resting upon said property as well as other property to secure the sum of twenty million dollars (\$20,000,000) and interest, said mortgage being dated January 1st, 1897, and being the mortgage of The Commercial Cable Company to The Farmers' Loan and Trust Company as Trustee; **TO HAVE AND TO HOLD** the said premises unto the said Postal-Telegraph-Cable Company, its successors and assigns, to its and their only proper use and behoof forever, so that neither the said Pacific Postal Telegraph-Cable Company nor any other person in its name and behalf shall or will hereafter claim or demand any right or title to the premises or any part thereof, but they and every of them shall by these presents be excluded and forever barred.

IN WITNESS WHEREOF the said Pacific Postal Telegraph-Cable Company has caused these presents to be signed and its corporate seal to be hereunto affixed and duly attested by its proper officers, duly authorized so to do, this ninth day of December, 1903.

PACIFIC POSTAL TELEGRAPH-CABLE
COMPANY,

By

(Signed) W. H. BAKER,
Vice-President.

Attest:

(Signed)

J. O. STEVENS,
Secretary.

Filed Oct. 10, 1913.

A. M. CANNON, Clerk U. S. Dist. Court.

And afterwards, to wit: on the 17th day of December, 1913, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[PETITION FOR APPEAL]

(TITLE)

The above-named defendants, Southern Pacific Company and Western Union Telegraph Company, conceiving themselves aggrieved by the decree entered in the above-entitled cause on the 3rd day of November, 1913, hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and pray that the appeal be allowed and that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and your petitioners pray that said decree may be reviewed and reversed.

Dated, December , 1913.

WM. D. FENTON,
JAMES E. FENTON,
BEN C. DEY and
KENNETH L. FENTON,

Solicitors and Counsel for Defendant and
Appellant, Southern Pacific Company.

DOLPH, MALLORY,
SIMON & GEARIN and
HALL S. LUSK,

Solicitors and Counsel for Defendant and
Appellant, Western Union Telegraph Com-
pany.

(Endorsed) Petition for Appeal Filed Dec. 17, 1913.
A. M. CANNON, Clerk U. S. Court.

And afterwards, to wit: on the 17th day of December, 1913, there was duly filed in said Court, Assignments of Error in words and figures as follows, to wit:

[ASSIGNMENTS OF ERROR]

(TITLE)

The defendants, Southern Pacific Company and Western Union Telegraph Company, assert that in rendering the decree entered in the above-entitled cause on the 3rd day of November, 1913, the said Circuit Court erred in the following particulars, to wit:

I

In overruling the demurrer of the defendant, Western Union Telegraph Company, to Complainant's Supplemental Complaint.

II

In declaring that the contract of the defendant, Western Union Telegraph Company, with the defendant, Southern Pacific Company, mentioned and set forth in the Supplemental Bill and the Answer of the defendant, Western Union Telegraph Company, filed in this case, in so far as the Western Union Telegraph Company is by said contract granted the exclusive right and privilege of occupying the right of way of the Southern Pacific Company for maintaining telegraph lines, is contrary to public policy, nugatory and void, and of no effect whatever.

III

In authorizing, permitting, directing and commanding the defendant, Southern Pacific Company, to conclude that certain agreement with the complainant, Postal Telegraph Company, attached to and made a part of the Supplemental Complaint, and marked Exhibit "A."

IV

In enjoining and restraining the defendant, Western Union Telegraph Company, from interfering with the execution of said contract.

V

In not dismissing Complainant's Supplemental Complaint, because the Court was without jurisdiction or authority to compel the Western Union Telegraph Company to give its assent to the execution of the said contract between complainant and the defendant, Southern Pacific Company.

VI

In not dismissing Complainant's Supplemental Complaint, because the defendant, Southern Pacific Company, had the right under its said contract with the defendant, Western Union Telegraph Company, to refuse to execute said contract with the Postal Telegraph Company.

VII

In not dismissing Complainant's Supplemental Complaint, because the defendant, Southern Pacific Company, had the right to make the execution of its said contract with the defendant, Postal Telegraph Company, dependent upon the assent of the defendant, Western Union Telegraph Company, which assent was never given, and the Court was without authority or jurisdiction to compel the execution of said contract without said assent of the defendant, Western Union Telegraph Company, and without authority or jurisdiction to compel said defendant, Western Union Telegraph Company, to give such assent.

VIII

In not dismissing Complainant's Supplemental Complaint and in not adjudging and decreeing that the Court was without jurisdiction or authority to compel the Western Union Telegraph Company to give its assent to the execution of the said contract between complainant and the defendant, Southern Pacific Company.

IX

In not dismissing Complainant's Supplemental Complaint and in not adjudging and decreeing that the defendant, Southern Pacific Company, had the right, under its said contract with the defendant, Western Union Telegraph Company, to refuse to execute said contract with the Postal Telegraph Company.

X

In not dismissing Complainant's Supplemental Complaint and in not adjudging and decreeing that the defendant, Southern Pacific Company, had the right to make its execution of said contract with the defendant, Postal Telegraph Company, dependent upon the assent of the defendant, Western Union Telegraph Company, which assent was never given, and that the Court was without authority or jurisdiction to compel the execution of said contract without said assent of the defendant, Western Union Telegraph Company, and without authority or jurisdiction to compel said defendant, Western Union Telegraph Company, to give such assent.

WM. D. FENTON,
JAMES E. FENTON,
BEN C. DEY and
KENNETH L. FENTON,

Solicitors and Counsel for Defendant and
Appellant, Southern Pacific Company.

DOLPH, MALLORY,
SIMON & GEARIN,
and HALL S. LUSK,

Solicitors and Counsel for Defendant and
Appellant, Western Union Telegraph Com-
pany.

(Endorsed) Assignment of Errors Filed Dec. 17, 1913.

A. M. CANNON, Clerk U. S. Court.

And afterwards, to wit: on the 17th day of December, 1913, there was duly filed in said Court, an Order Allowing Appeal in words and figures as follows, to wit:

[ORDER ALLOWING APPEAL]

(TITLE)

On this 17th day of December, 1913, came the Southern Pacific Company and the Western Union Telegraph Company, defendants in the above-entitled cause, and filed herein and presented to the court their petition for the allowance of an appeal from the decree made and entered in said cause on the 3rd day of November, 1913, together with assignment of errors, and praying that a transcript of the records, proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

In consideration whereof this court does hereby allow the said appeal of said defendants from said decree upon said defendants giving a bond according to law and the rules of said Circuit Court of Appeals, in the sum of Five Thousand (\$5000.00) Dollars, to answer all damages and costs if they shall fail to sustain their said appeal;

And it is further ordered, that upon the giving of such bonds, there shall be a stay of execution of that portion of the said decree directing and commanding the

defendant, Southern Pacific Company, to conclude that certain agreement with the complainant, Postal Telegraph Company, mentioned in the pleadings in this case and in said decree set forth.

Done in open court this 17th day of December, 1913.

CHAS. E. WOLVERTON,

Judge.

(Endorsed) Order allowing appeal filed Dec. 17, 1913.

A. M. CANNON, Clerk U. S. Court.

And afterwards, to wit: on the 23rd day of December, 1913, there was duly filed in said Court, a Bond on Appeal in words and figures as follows, to wit:

[BOND ON APPEAL]

(TITLE)

KNOW ALL MEN BY THESE PRESENTS:

That we, the Southern Pacific Company, a corporation duly organized and existing under the laws of the State of Kentucky, and the Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York, as principals, and the Maryland Casualty Company of Baltimore, a corporation duly organized and existing under the laws of the State of Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand (\$5000.00) Dollars, to be paid to the said United States of America, its attorneys or assigns, of which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 18th day of December, A. D. 1913.

WHEREAS, on the 3rd day of November, 1913, in a suit in the District Court of the United States for the District of Oregon, between the Postal Telegraph Company, a corporation, complainant, and said South-

ern Pacific Company and Western Union Telegraph Company, defendants, a decree was rendered against the defendants, and the said defendants obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit, and a citation directed to the said Postal Telegraph Company is about to be issued citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the said Southern Pacific Company and Western Union Telegraph Company shall prosecute their said appeal to effect and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

SOUTHERN PACIFIC COMPANY,

By WM. D. FENTON, (Seal)

Its Solicitor and Counsel.

WESTERN UNION TELEGRAPH COMPANY,

By RUFUS MALLORY, (Seal)

Its Solicitor and Counsel.

MARYLAND CASUALTY COMPANY,

(Corporate Seal) By GEO. S. RODGERS,

Attorney.

Countersigned: CHAS. D. FISK,
Attorney.

Examined and approved this 23rd day of Dec., 1913.
CHAS. E. WOLVERTON,
Judge.

(Endorsed) Bond on appeal filed Dec. 23, 1913.
A. M. CANNON, Clerk U. S. Court.

CITATION ON APPEAL.

To Postal Telegraph Company, Greeting:

You are, therefore, hereby cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

CHAS. E. WOLVERTON,
Judge.

Due service of the foregoing Citation on Appeal is admitted this 29th day of December, 1913.

ROGER B. SINNOTT,
Of Counsel for Complainant.

(Endorsed) Citation on Appeal filed Dec. 29, 1913.
A. M. CANNON, Clerk U. S. Court.

And afterwards, to wit: on Tuesday, the 13th day of January, 1914, the same being the 59th Judicial day of the regular November term of said court; present: the Honorable Chas. E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[ORDER ENLARGING TIME TO FILE
TRANSCRIPT]

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

Postal Telegraph Company, a)	
Corporation, Complainant,)	
vs.)	No. 3829
Southern Pacific Company, a)	
Corporation, and Western)	
Union Telegraph Company,)	
a Corporation,)	

Now, at this day comes the complainant by Messrs. Sinnott & Adams, of counsel, and the defendants, by Mr. Ben C. Dey and Rufus Mallory, of counsel, and thereupon this cause comes on to be heard upon the motion of said defendants for an extension of time in which to file a transcript therein in the United States Circuit Court of Appeals for the Ninth Circuit, and counsel consenting thereto, it is ordered that the time in which to file said transcript in the said United States

Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby extended to March 1, 1914.

CHAS. E. WOLVERTON, Judge.

Dated January 13, 1914.

And afterwards, to wit: on Tuesday, the 17th day of February, 1914, the same being the 89th Judicial day of the regular November term of said Court; present: the Honorable Chas. E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[ORDER ENLARGING TIME TO FILE
TRANSCRIPT]

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

Postal Telegraph Company,)	
v.	)	No. 3829
Southern Pacific Company,)	

February 17, 1914.

Now, at this day, for good cause shown, it is ordered that defendant's time for filing the record and docketing this cause in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended thirty (30) days from March 1, 1914.

CHAS. E. WOLVERTON, Judge.

And afterwards, to wit, on Friday, the 27th day of March, 1914, the same being the . . . Judicial day of the Regular March Term of said Court; Present: the Honorable Chas. E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

(ORDER ENLARGING TIME TO FILE
TRANSCRIPT.)

IN THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
OREGON.

Postal Telegraph Company)	
v.	)	No. 3829
Southern Pacific Company and West-)	
ern Union Telegraph Company.)	

March 27, 1914.

Now, at this day, for good cause shown, it is Ordered that defendants time for filing the record and docketing this cause in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including April 4, 1914.

CHAS. E. WOLVERTON,

Judge.

[CLERK'S CERTIFICATE]

United States of America,)
) ss.
 District of Oregon.)

I, A. M. Cannon, Clerk of the District Court of the United States for the District of Oregon, certify that the foregoing pages, numbered 1 to 394, inclusive, contain and are a full, true and correct transcript of the record and proceedings had in said court in the cause entitled Postal Telegraph Company v. Southern Pacific Company et al., and contains in itself, and not by reference, all the pleadings, papers, orders and files in said cause made or considered by the Court in the rendition of the final decree herein, and in any way necessary to the hearing of the appeal herein; a condensed statement of the testimony, together with the exhibits, the petition for appeal, order allowing appeal, assignments of errors, the bond and citation on appeal, all as designated by counsel to be included in the transcript and as the same appear of record in my office and in my official custody.

I further certify that the cost to the Appellants for the printing of said record is the sum of \$ _____.

In testimony whereof I have hereunto set my hand
and affixed the seal of said Court this day of
., 1914.

A. M. CANNON.

Clerk.

No. 2399

IN
**The United States Circuit
Court of Appeals
For the Ninth Circuit**

WESTERN UNION TELEGRAPH CO.

AND

SOUTHERN PACIFIC CO.

APPELLANTS

VS.

POSTAL TELEGRAPH CO.

APPELLEE

Appellants' Brief

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF OREGON**

**W. D. FENTON, JOSEPH E. FENTON
BEN C. DEY and KENNETH L. FENTON**

**Solicitors for Appellant
Southern Pacific Co.**

**DOLPH, MALLORY, SIMON & GEARIN
HALL S. LUSK**

**Solicitors for Appellant
Western Union Telegraph Co.**

**F. V. HOLMAN
A. M. HAMPSON**

Solicitors for Appellee

No. 2399

IN
**The United States Circuit
Court of Appeals**
For the Ninth Circuit

WESTERN UNION TELEGRAPH CO.
and SOUTHERN PACIFIC CO.,
Appellants,

VS.

POSTAL TELEGRAPH CO.,
Appellee.

Appellants' Brief

*Appeal from the District Court of the United
States for the District of Oregon.*

STATEMENT OF THE CASE

In the year 1907, the Pacific Postal Telegraph Company, the predecessor in interest of the complainant in the present suit, commenced an action against the Oregon & California Railroad Company and the Southern Pacific Company, its tenant, for the purpose of appropriating the right

of way of those companies, from the City of Portland in Multnomah County, Oregon, to the state line between the States of California and Oregon, for a telegraph line to be constructed and maintained by the complainant.

Complainant alleged that the damages to be sustained by the defendants by reason of such appropriation would be the sum of \$2100; but on trial being had to a jury, the damages of the defendants were assessed in the sum of \$66,600. The Pacific Postal Telegraph-Cable Company did not take advantage of its right to pay that sum as compensation and use the Southern Pacific's right of way for its telegraph line, but instead waited nearly four years without taking any action whatever, and then commenced the present suit, as the Postal Telegraph Company, against the Southern Pacific Company, to establish its right to repair, maintain and construct its lines upon the railroad's right of way by reason of an alleged adverse, uninterrupted and notorious possession of over twenty-four years.

The Western Union Telegraph Company was not originally a party to the proceedings, but after the case had come to issue and after a part of the testimony had been taken was brought in as a defendant through the medium of a supplemental bill filed for the purpose of setting up a new state of facts which had in the meantime arisen.

BILL OF COMPLAINT

It is alleged in the original bill, filed August 25, 1911, that the Southern Pacific Company owns a leasehold interest in the railroad right of way of the Oregon & California Railroad Company, from Eugene in Lane County, Oregon, to New Era, in Clackamas County, a distance of 103 miles, upon part of which right of way the complainant maintains a telegraph line.

That the Pacific Postal Telegraph-Cable Company, the predecessor in interest of complainant (which corporation had duly accepted the provisions of the "Post Roads Act of Congress"), constructed a telegraph line along said right of way more than twenty-four years ago; that between New Era and Eugene the greater number of poles of said telegraph line are not upon the defendant's right of way, but upon land adjoining, and in some places where the poles are upon land adjoining the cross-arms and wires overhang the right of way.

That complainant's predecessor in interest, the Pacific Postal Telegraph-Cable Company, erected said poles or strung the wires thereon without permission or license from the Southern Pacific or the Oregon & California Railroad Company, and for more than twenty-four years its possession has been open, notorious, peaceable, adverse, continuous and uninterrupted.

That the defendant leased the said right of way from the Oregon & California Railroad Com-

pany subject to the rights of the Postal Telegraph Company and the burden of its telegraph line upon the said right of way.

That the Oregon & California Railroad Company was one of the so-called land grant rail roads.

That complainant's telegraph line does not interfere with the operation of the defendant's railroad, and the part of the right of way occupied by the Postal Company is not needed for railroad purposes, and that the Postal Company will not attach its wires or fixtures to defendant's bridges, trestles, buildings or structures.

That complainant has accepted the provisions of the act of July 24, 1866, and therefore has the right to maintain its telegraph line on the right of way of defendant.

That complainant has the right to maintain its line as aforesaid without payment of compensation to defendant, but offers one dollar per mile for the land on said right of way as a gratuity.

It is further alleged, that owing to the wear and tear of the elements and in order to properly handle the business entrusted to complainant by the public and the United States government, it is imperative that complainant's telegraph line be at once repaired and reconstructed.

That although the Southern Pacific Company's assistant general manager has informed the Postal's duly authorized agent that it would

prevent complainant, by force and violence if need be, from repairing and reconstructing said telegraph line. nevertheless complainant on or about July 25, 1911, set about repairing and reconstructing its said line in a careful manner and so as not to interfere with the operation of defendant's railroad, planting new poles in identically the same portions of ground that had been occupied by the old and worn poles; but the defendant on July 28, 1911, sawed off ninety of the new cross-arms and greatly damaged complainant's line and threatens to prevent any further repairing or reconstruction of said telegraph line with force and violence.

The prayer of the bill is for an injunction restraining the defendant from in any way interfering with the repair, construction, improvement and maintenance of complainant's telegraph line on the defendant's right of way between New Era and Eugene.

ANSWER OF SOUTHERN PACIFIC COMPANY

The answer of the Southern Pacific Company denies the allegation of open, notorious, peaceable, adverse, continuous and uninterrupted possession by complainant, and denies that the telegraph line of complainant does not interfere with the operation of defendant's railroad.

For affirmative defense, it is alleged that in November, 1886, while defendant's predecessor,

the Oregon & California Railroad Company, was in the hands of a receiver of the United States Circuit Court, the Pacific Postal Telegraph-Cable Company, complainant's predecessor in interest, presented a petition to said court asking that it be allowed to place its poles, cross-arms and wires upon the right of way of said railroad, upon condition that it should allow the same to remain upon said right of way for such time as the receiver should be in possession of said road. That an order was made granting the prayer of such petition on September 18th, 1886. Copies of the petition and order are set forth in the answer.

It is alleged that such occupancy as the plaintiff and its predecessor have on said right of way was taken under the permission granted by said order of the court, and that at the close of the receivership the poles and overhanging cross-arms of the complainant's predecessor were allowed to remain by permission and sufferance of defendant, on the right of way between New Era and Eugene.

It is further alleged that in the past five years the use of the entire right of way of defendant for railroad purposes has become necessary, particularly on account of the installation of a block signal system, and for that reason it has become necessary to revoke the permission granted to complainant's predecessor.

For a second affirmative defense, the defendant set up the proceedings in the former

suit hereinbefore referred to filed October 25, 1907, by the Pacific Postal Telegraph-Cable Company against the Oregon & California Railroad Company and the Southern Pacific Company, to condemn a portion of the defendant's railroad right of way in the State of Oregon, alleging that the judgment in that suit constituted an adjudication of all the matters and things at issue in the case at bar. In the condemnation suit referred to the jury by their verdict awarded the defendants the sum of \$66,600 as compensation for the use of their right of way by the Postal Company, and it is alleged in defendant's answer that the complainant is prosecuting this suit for the purpose of evading the payment of the said award of \$66,600.

The case being at issue, the taking of testimony was commenced, but was adjourned from time to time in consequence of certain negotiations entered into by the parties looking to an amicable settlement of their differences. (Tr., p. 331.) A contract to this end was prepared by the Southern Pacific and submitted to the Postal Company, which made a few suggestions in the way of modifications. (Tr., p. 327; Plaintiff's Exhibit No. 20.) Counsel for the Postal Company discussed with counsel for the Southern Pacific Company this proposed contract of adjustment, and the modifications therein, suggested by the Postal Company, and the Southern Pacific Company's counsel stated that the form

of contract was satisfactory to him (Tr., pp. 328, 329); but the contract was never signed owing to the fact that the Western Union Telegraph Company declined to give its assent to the execution thereof by the Southern Pacific Company. (Tr., p. 330.) Subsequently the Western Union took over the defense of the suit (Tr., p. 330), and thereupon the complainant filed its

SUPPLEMENTAL COMPLAINT

in which were recited the facts of the filing of the original bill and answer, and the unsuccessful attempt of the parties to adjust their differences as hereinbefore related. A copy of the proposed agreement is attached to the supplemental bill (Exhibit "A," Tr., p. 144), and it is alleged that there is a contract existing between the Southern Pacific Company and the Western Union Company under the terms of which the latter company claims the right to prevent the settlement of this action; that the complainant has been unable to obtain a copy of this contract, but alleges, upon information and belief, that said contract is in violation of the Act of Congress of August 7, 1888, the Southern Pacific Company, as a land grant railroad, being subject to the provisions of said act of Congress.

It is further alleged that in addition to owning and maintaining a telegraph line between Eugene and New Era, complainant had also for more than twenty years maintained a telegraph line

along defendant's right of way between Portland and Myrtle Creek and Myrtle Creek and Ashland, in the State of Oregon, and that the right to maintain all of this line was included in the negotiations referred to.

By the prayer complainant sought to require the Western Union Telegraph Company to set forth its contract with the Southern Pacific Company, and further, that the contract between complainant and the Southern Pacific Company (Exhibit "A" of the supplemental bill) be made the basis of a decree to be entered adjudicating the rights of all parties to the suit.

Both the Southern Pacific and the Western Union demurred to the supplemental bill, and the court, having overruled the Western Union's demurrer, the latter filed its

ANSWER TO THE SUPPLEMENTAL BILL

in which it is set forth that defendant "admits that there is a contract between the Southern Pacific Company and the Western Union Telegraph Company, this defendant, by and through which this defendant claims certain rights and privileges regarding the use of the right of way of the railway of the Southern Pacific Company in the supplemental bill set forth; but denies that this defendant claims the right to prevent the settlement of this action except so far as any proposed settlement may injuriously effect any

rights of this defendant. That it claims the right to object to or prevent such or any settlement as will or may involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and the complainant, this defendant claims no right to object, unless its approval of such proposed settlement is made a condition upon which the Southern Pacific Company undertakes to execute such agreement, in which case this defendant claims that it may withhold its assent and thereby prevent the execution of said agreement, whether this defendant has any interest in or is to be affected by such agreement or not." (Tr., p. 162.)

That, further, the proposed agreement was laid before the defendant by the Southern Pacific for its consideration, and that the defendant, exercising its option in the premises, declined to approve the proposed agreement, and in pursuance of its terms took over the defense of this suit.

By way of affirmative defense, the Western Union recited the making of an agreement April 1st, 1871, between it and the Oregon & California Railroad Company, under the terms of which the Western Union agreed to construct, maintain and operate the telegraph line required by the Act of Congress, July 25, 1911; and the construction and maintenance of said telegraph line pursuant to the terms of said agreement are alleged. That

on October 1st, 1901, the Southern Pacific Company, the lessee of the Oregon & California Railroad Company, and the Western Union Telegraph Company entered into the agreement set up in the answer and which is the agreement sought to be disclosed by the supplemental bill, and under which, it is alleged, the Telegraph Company has continued to hold possession of said right of way for telegraph purposes, and has performed all requirements of the Act of July 25, 1866, and met all demands of the railroad and of the United States.

In general, this contract provides for the ownership, construction, reconstruction and maintenance of a telegraph line by the Western Union along the right of way of the Southern Pacific, for a stated compensation to be paid by the Western Union, and other considerations, and the particular clause of the agreement around which the controversy in this case centers is as follows:

“Section 9. Exclusive Right of Way. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance and operation of lines of poles and wires and underground or other lines for commercial or public telegraph and public telephone uses or business, with the right to con-

struct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder.

"Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

"And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained against the Railroad Company in respect to any of the matters in this section mentioned." (Tr., p. 180.)

DECREE

The Postal Telegraph Company, having filed its replication, the further taking of testimony was proceeded with and concluded, and on November 3, 1913, the court entered a decree in favor of the complainant, by the terms of which the contract between the Western Union Tele-

SPECIFICATION OF ERRORS.

The appellants rely upon the following errors of the District Court:

I.

The Court erred in overruling the demurrer of the appellant, Western Union Telegraph Company, to the Appellee's Supplemental Bill.

II.

The Court erred in authorizing, permitting and directing the appellant, Southern Pacific Company, to conclude that certain agreement with the appellee, attached to and made a part of the Supplemental Complaint and marked Exhibit "A."

III.

The Court erred in not dismissing the Supplemental Complaint, because the Court was without jurisdiction to compel the appellant Western Union Telegraph Company to give its assent to the execution of the said contract between appellee and appellant, Southern Pacific Company.

graph Company and the Southern Pacific Company, hereinbefore referred to, "in so far as the said Western Union Telegraph Company is by said contract granted the exclusive right and privilege of occupying the right of way of the Southern Pacific Company for maintaining telegraph lines," is declared to be "contrary to public policy, nugatory and void and of no effect whatever"; and, further, the defendant Southern Pacific Company is authorized, permitted, directed and commanded to conclude the tentative agreement which had been drawn up between the Southern Pacific Company and the Postal Telegraph Company; and the defendant Western Union Telegraph Company is enjoined from interfering with the execution of said contract. (Tr., pp. 203 to 213.)

A decision of the other issues in the case—the complainant's claim of a prescriptive right, the Southern Pacific Company's contention that its entire right of way was necessary for railroad purposes, and the defense of prior adjudication—was rendered unnecessary by the court's decree directing the execution of that agreement.

POINTS AND AUTHORITIES

I.

A court of equity will not allow the complainant by a supplemental bill to reconstruct entirely the case made by the original bill, by the introduction of an additional case, but the new

facts alleged in a supplemental bill must be such merely as go to support and strengthen the allegations of the original bill.

Encyc. Pl. & Pr., Vol XXI, p. 20.

Higginson v. Chicago, B. & Q. R. Co., 102 Fed. 197.

Smith v. Pyrites Mining & Chemical Co., 43 S. E. 564; 101 Va. 301.

Swedish-American Nat. Bank v. Dickinson Co., 69 N. W. 455; 6 N. Dak. 222.

II.

A new and independent cause of action which has accrued since the filing of the original bill of complaint, and upon which a recovery may be had without regard to the cause of action originally stated, cannot be set up in a supplemental bill or complaint.

Barker v. Prizer, 150 Ind. 4; 48 N. E. 4.

III.

The permissive enjoyment of an easement cannot give title by prescription, however long it may be continued.

Null v. Williamson, 78 N. E. 76; 166 Ind. 537.
Chicago, B. & Q. R. R. Co. v. Ives, 66 N. E. 940; 202 Ill. 69.

Phoenix Ins. Co. v. Haskett, 67 P. 446; 64 Kan. 93.

Beach v. Morgan, 41 A. 349; 67 N. H. 529.

Abraham v. Owens, 20 Ore. 511.

Kirk v. Smith, 22 U. S. (9 Wheat.) 241.

IV.

An offer to purchase after the expiration of the full prescriptive period tends to show that the use during the prescriptive period was not adverse.

American Bank Note Co. v. New York Elevated R. R. Co., 129 N. Y. 252, 268.

Perrin v. Garfield, 37 Vt. 304.

Tacy v. Atherthon, 36 Vt. 503.

ARGUMENT

A great deal of testimony was taken by the complainant for the purpose of showing that the telegraph line of the Postal Telegraph Company could be maintained and operated along the Southern Pacific Company's right of way without interfering with the operation of the railroad, and in particular it was sought to be shown that the maintenance and operation of a telegraph line on the same side of the right of way with the railroad's block signal system would not cause any interference with the operation of the railroad signal system by induction. We do not apprehend that that question will be of importance in the final decision of this suit, and content ourselves with merely calling the attention of the court to the clear and convincing testi-

mony on this point of the witness McKeen for the appellants.

Before discussing the court's action in decreeing the execution of the tentative agreement between the Southern Pacific Company and the Postal Telegraph Company, we wish to submit the following remarks as to the propriety of allowing the complainant to file its supplemental bill.

Supplemental Bill Not Proper

Both defendants demurred to the supplemental bill, and the record shows that the demurrer of the Western Union Telegraph Company was overruled by the court. It should have been sustained, if for no other reason than that the matters averred were not matters proper to be brought before the court by supplemental bill.

It is true that the office of a supplemental bill is to set up new matters which have arisen since the filing of the original bill, but it is also true that this new matter must not be such as that it changes the cause of action, or such as that a recovery could be had upon the new facts brought forward independently of the averments of the original bill.

The case of *Swedish-American Nat. Bank v. Dickinson Co.*, 69 N. W. 455, 6 N. Dak. 222, contains a full and learned exposition of the rule which we have stated. The plaintiff in that case

sued upon promissory notes, and while the suit was still pending he recovered in the State of Minnesota, against the same defendants, a judgment upon the identical causes of action embraced in the complaint in the North Dakota case. Thereafter counsel for plaintiff applied to the court for permission to file a supplemental complaint. The District Court refused to grant this motion, and on appeal its action was sustained by the Supreme Court.

The court said:

“If the original bill is not defective in substance, new facts may, by supplemental bill, be incorporated into the cause of action, although they necessitate an enlargement or change in the character of the relief originally sought. But in every decision on this point the qualification is stated or plainly to be inferred from the opinion that a new cause of action cannot be substituted for the one set forth in the original pleading. *Jacob v. Lorenz*, (Cal.) 33 Pac. 119-121; *Candler v. Pettit*, 1 Paige, 168; *Jaques v. Hall*, 3 Gray, 194; *Winn v. Albert*, 2 Md. Ch. 42; *Edgar v. Clevenger*, 3 N. J. Eq. 258. But in the case at bar the plaintiff does not seek to enlarge its relief or alter the character thereof. It merely asks that it be allowed to obviate a perfect defense to its causes of action on the notes, and recover the same money judgment upon an entirely distinct cause of action, not in existence when it brought the suit, but arising subsequently to its conclusion.”

Numerous cases are cited in the opinion and quoted from, demonstrating the soundness of the rule adopted by the court. On rehearing the plaintiff, while conceding the rule that the supplemental bill must not contain a new cause of action, urged that in truth the cause of action was the same in both the supplemental and the original complaints, inasmuch as the debt and the defendant's failure to respect it, was, according to the contention, the cause of action. But the court showed clearly the unsoundness of this contention, saying that "in every case there is present the fact that the defendant has neglected to observe his legal duty to the defendant," and "A plaintiff's primary right in an action upon a note is the defendant's duty to him which the note creates. When a judgment is rendered upon such note, the primary right is the defendant's duty to the plaintiff created by such judgment, and not by the note, which has ceased to be the source of any duty of the defendant to the plaintiff."

Barker v. Prizer, 150 Ind. 4, 48 N. E. 4, was an action to recover damages for slander. In her complaint, plaintiff alleged that the words complained of were uttered on July 9, 1895, and on August 9, 1894; and afterward plaintiff filed a supplemental complaint alleging that at other times, subsequent to the filing of the original complaint, the defendant had spoken other slan-

derous words, for which additional damages were asked.

In discussing the right to set up such matters in a supplementary bill, the court, after stating that the code of the State of Indiana, in permitting supplemental pleadings to be filed, intended to follow the former rule recognized in courts of chancery, and that therefore the authorities on chancery procedure might properly be applied to in order to ascertain the nature and purpose of a supplemental bill, said:

“It is well affirmed by the authorities that the facts set up by way of supplemental bill or complaint may be consistent with and in aid of the case made by the original complaint. But the question with which we have to deal in this appeal is, can a new and independent cause of action, which has accrued in favor of the plaintiff since the filing of the original complaint, and upon which a recovery may be had without regard to the cause of action stated in the latter, be set up by means of a supplemental complaint, and a recovery authorized thereon in the suit? The question, under a rule firmly settled, must be answered in the negative. See *Milner v. Milner*, 2 Edw. Ch. 114; *Watson v. Thibou*, 17 Abb. Prac. 184; *Tiffany v. Bowerman*, 2 Hun. 643; *Pinch v. Anthony*, 10 Allen 470; *Bull v. Rothchild*, 4 N. Y. Supp. 826.”

In *Higginson et al. v. Chicago B. & Q. R. R. Co.*, 102 Fed. 197, 200, *Higginson et al.* filed a supplemental bill in a case originally brought by the

same complainants against the Chicago, Burlington & Quincy Railroad Company and the board of transportation for the State of Nebraska, as then constituted, wherein the complainants succeeded, after lengthy litigation, in obtaining a decree which, in substance, restrained the defendants in the original case from putting in force a certain scale of rates prescribed by the Legislature of Nebraska. The supplemental bill alleged that afterwards the board of transportation had made certain orders reducing the freight rates on certain commodities and requiring the railroad company to appear before the board and show cause why such orders should not be enforced; but that the power to prescribe rates and hear complaints of such nature had been taken away from said board, and an injunction was asked to restrain the board from entering upon such hearing.

Relief was denied on the ground, among others, that, as the court said:

“This question was in nowise raised or considered in the original case in which the supplemental bill has been filed, but is essentially a new question, and we do entertain grave doubts whether a supplemental bill to settle that question can be lawfully entertained consistently with established rules of procedure in equity. It would seem to be more appropriate to litigate a new question of that nature by an original bill, and this is an additional reason which has induced

us to approve of the action of the Circuit Court in denying a temporary injunction."

The cases which we have cited sufficiently show the scope and limitations of a supplemental bill in equity. The substance of those decisions is that the supplemental bill must not state a new cause of action, and must not set up facts upon which a recovery could be had independent of the cause of action originally stated.

The supplemental bill filed in this suit exceeds the bounds which have been set to a pleading of that nature. By the original bill the complainant sought to establish its right by prescriptive use to maintain and operate its telegraph line along the right of way of the Southern Pacific Company between Eugene, Lane County, Oregon, and New Era, Clackamas County, Oregon. By its supplemental bill complainant asked the court to decree the execution of a tentative agreement for the maintenance and operation of complainant's telegraph line along the Southern Pacific's right of way between Portland and Myrtle Creek in Oregon. The subject matter of the two suits is different; the relief prayed for is altogether different. Nor is it significant, as pointed out in *Swedish-American National Bank v. Dickinson*, *supra*, that by both bills it was sought to secure the use of the defendant's right of way. The causes of action are none the less entirely different; and if recovery on the new

facts set up in the supplemental bill is proper, that recovery could be had regardless of the matters alleged in the original bill.

It was not, therefore, proper to bring this new matter in by supplemental bill, and the demurrer of the Western Union Telegraph Company should have been sustained.

The Court Was Without Power to Decree the Execution of the Tentative Agreement

We question the power of a court of equity to compel parties to make an agreement against the wish of one of them, under the circumstances disclosed by the testimony in this case.

The agreement which is made the ground of the decree is tentative merely and binds nobody. Its terms had been distinctly agreed upon by the appellee and the Southern Pacific Company and a decree had been formulated which would probably afford sufficient cause to warrant the court to enter it of record, if the agreement had been concurred in by the Western Union Telegraph Company and executed by the parties to it. But since the Western Union Company refused its concurrence and the Southern Pacific Company on that ground refused to execute it, it is difficult to perceive how it can have any binding force for any purpose.

It must be conceded that if the Southern Pacific Company had an interest in the right of

way which the appellee desires to acquire, it may make its own terms upon which it will dispose of such right, provided such terms are not unlawful. The complainant and the Southern Pacific Company made this agreement with the understanding, so far as appears, that it must have the approval of the Western Union Telegraph Company. This was a condition precedent to its having any vitality or legal force. Nobody can reasonably claim that the condition was unlawful, or one which the parties or either of them must not lawfully attach to the contract and make the performance of the condition necessary to give validity to it. If this is true, the refusal of the Western Union Telegraph Company to approve is decisive against appellee's demand, upon this ground. The agreement is simply inoperative and void, and this ought to be conclusive against it.

At the trial below it was assumed in argument, by counsel for appellee, that the condition attached to the agreement depends for its validity upon whether the Western Union Telegraph Company has any interest in the subject matter of the agreement, and if it has none then it is not a condition and the agreement is binding without it. Nothing of this sort appears in the proposed agreement. The question of the interest of the Western Union Telegraph Company is not hinted at. It is a plain statement in effect that the consent of the Western Union Telegraph

Company must be had before the agreement will be binding. The Southern Pacific Company had a right to submit the proposed agreement to anyone it pleased as a condition precedent to its going into effect, and the party so selected may be someone having an interest or not. It was wholly a matter of discretion.

It is difficult for us to perceive how the court could grant the relief prayed for, so far as it rests upon this agreement, without its approval by the Western Union Telegraph Company, and since that company refused such approval the court must find a way to compel it to approve. It is not possible to conceive where such authority can be found. The Southern Pacific Company does not repudiate the contract, because it says it was never made, except with the condition annexed which had not been performed. This leaves the agreement with but one party to it, and the court could not properly grant the relief prayed for by appellee without not only ordering the Western Union Company to consent to the agreement but also ordering the Southern Pacific Company to execute it. Otherwise there is no executed agreement before the court and no basis for a decree.

It was also agreed below, that because the answer to the supplemental bill admitted that the tentative agreement set out was made, that fact warranted the court in accepting the draft of the

decree set out therein and entering it as the final determination of the parties' rights.

The fallacy of that argument seems too plain to need notice. The allegation in the bill and the supplemental bill that this tentative agreement had been entered into was true and could not truthfully be denied, but it appeared on the face of the pleading that the agreement was upon condition which had not been performed. How can it be said that the admission of the fact enlarged the rights of the appellee when the admission is accompanied by the denial that the agreement has any force for want of performance of the condition upon which its validity rests?

Prescriptive Right Not Established

In order to establish its claim to a right to maintain its line upon the right of way of the Southern Pacific Company by adverse possession for longer than the statutory period, appellee called to the stand a number of its officers and employes, the substance of whose testimony was that since the year 1887 the Portland office of the Postal had been connected with the San Francisco office by a telegraph line that is now in operation over the right of way of the Southern Pacific Company, and that repairs had been made upon the telegraph line from time to time without any objections on the part of the Southern Pacific Company prior to the year 1911. There is also the testimony of several of these witnesses

to the general effect that they could determine how long a telegraph pole had been in the ground from its appearance, and that an examination disclosed that many of the poles of the Postal Telegraph Company on the Southern Pacific right of way were from 20 to 30 years old. (Tr., pp. 290, 301, 304.)

But the evidence is convincing that the complainant's use of the right of way, however long it may have continued, was in fact never adverse.

The principle is well established and, we take it, will not be called in question, that an offer to purchase after the expiration of the full prescriptive period strongly tends to show that the use during the prescriptive period was not adverse. In the case of *American Bank Note Co. v. N. Y. Elevated R. R. Co.*, 129 N. Y. 252, 268, it was said:

“But there is still another fact to be considered. After the expiration of twenty years from July 2, 1868, and during the pendency of the present action, the defendants instituted proceedings to condemn the plaintiff's street rights. There is no question over the admissibility of the evidence, for the defendants themselves gave the proof. The proceeding was necessarily a solemn and formal admission of record of title in the plaintiff to the incorporated rights in question. It is to be granted that such an admission made after the prescriptive right had been acquired would not serve to destroy it. But the admission is evidence, reflecting back on what has occurred,

and tending to show what the real character of the possession claimed to be adverse in truth was. (Perrin v. Garfield, 37 Verm. 306.) The company learned what its own possession and that of its predecessor had actually been, and it is hardly conceivable that, if such possession had been adverse either in fact or in intention, an admission would be formally made of ownership in the easements outstanding in the abutter."

That case is on all fours with the facts in the case at bar.

The use of the Southern Pacific's right of way by the Postal Company was, from its inception, a permissive use. By an order of Hon. Matthew P. Deady, Judge of the Circuit Court of the United States for the District of Oregon, dated December 1, 1886, while the Oregon & California Railway Company was in the hands of a receiver, the Pacific Postal Telegraph-Cable Company was given permission to erect its poles and maintain its lines upon the following portions of the right of way of the railroad company, and for the period indicated:

"From Portland, Oregon, south fifteen miles to Oregon City; and from a point near Eugene City to Goshen; and from the station of Yoncalla on said railway to Roseburg, and from about one mile in length near the station of Woodburn on said railroad; and that said petitioner be also permitted to run its telegraph wire, with the necessary appurtenances, across the Willamette

River, on the bridge of said railway company across said river near the station of Harrisburg, and that the twelve poles already placed by petitioner upon land which is in dispute as between said railway company and the alleged private owner thereof, be permitted to remain upon said land, so far as the title of said railway company to said land may be concerned; but nevertheless this order is upon the express condition that the petitioner, in availing itself of the privileges hereby granted to it, of going upon the right of way of the said railway company, and using the said railway bridge in the construction of its telegraph line, shall in no way interfere with the operations of the said railway company, nor cause said company any material damage or inconvenience, and that said privileges are granted merely for the time being, and shall not in any event extend beyond the period during which the said railway company remains in the charge and under the control of this court, by reason of the present receivership."

Mr. Koehler, the receiver, afterwards manager for the Southern Pacific Company when that company leased the railroad, testified that the encroachments upon the right of way for the distance of about four miles between New Era and Eugene, he thought were made shortly before or immediately after the petition was filed, and that such encroachments were made with the permission of the court. (Tr., p. 306.) "That he allowed the telegraph line to remain upon the right of way while he was general manager

because it did not interfere with the operation of the line, and because their relations with the Postal Company were quite friendly; that this company helped the railroad company off and on. That no negotiations were had between the Southern Pacific Company and the Pacific Postal Telegraph-Cable Company at the termination of the receivership; that the latter company simply remained on the right of way and nothing took place. That the witness understood that they were there at the will of the railroad company, with the understanding that the railroad company would not remove the Postal line unless there was some necessity for it. That up to 1904 the witness never heard of any claim being asserted by the Pacific Telegraph-Cable Company, or by the Postal Telegraph Company of Oregon, or any affiliated company, to the effect that these poles and wires were there by any right in the Postal Company. That up to 1904, at which time the witness gave up the management of the road, he never heard of any claim of ownership by the Postal Company or any company which claimed to own this telegraph line, of any ownership in the right of way, or of any claim other than the right given by order of the court, and that during all that period the witness was willing to permit the Postal Company to remain on the right of way so long as it did not interfere with the operation of the road, and did so permit it to remain." (Tr., pp. 308, 309.)

Mr. C. G. Sutherland, who had worked in various capacities for the Southern Pacific Company where he would be in a position to know whether any transactions were taking place between the Postal Companies and the Southern Pacific Company, testified that he had never heard of any claim being asserted by any of the Postal Companies of any right in the property of the Oregon & California Railroad right of way until July, 1911, at which time Mr. Blake, General Superintendent of the Postal Company, stated that that company intended rebuilding their line between Eugene and Springfield Junction, and between Portland and Salem:

“That a few days later Mr. Annand made request on the Southern Pacific Company for outfit cars for use of gangs in renewing the line above referred to, and a few days later wanted a work train assigned to him to distribute poles and other material, which the railroad company declined to do, for the reason that the Postal Company had declined to enter into any agreement with the railroad company in regard to their right to be upon the railroad right of way. The witness stated that at the conference with Mr. Blake, in 1911, Mr. Blake claimed that the Postal Company had a prescriptive right in the right of way. That the Postal Company claimed the right by prescription—a right of way for such poles and wires as were already upon the right of way of the company, and that he had never heard of any such claim on the part of the Postal Company prior to that date.” (Tr., p. 311.)

We have already called attention to the fact that the Pacific Postal Telegraph-Cable Company commenced proceedings against the railroad company in October, 1907, to condemn a right along the entire right of way of the railroad for telegraph purposes, from Portland to the California state line. The territory sought to be condemned includes within it the portion from New Era to Eugene which is claimed to have been acquired by prescription.

We submit that the evidence of Koehler and Sutherland, in connection with this "solemn and formal admission of record of title in the plaintiff to the incorporeal rights in question" (as said by the court in *American Bank Note Co. v. N. Y. Elevated R. R. Co.*, *supra*) is conclusive on the question of prescription, and demonstrates that after the receivership, as well as before, the possession of the Postal Telegraph Company and its predecessor in interest was permissive and not adverse.

For the reasons advanced, the decree of the District Court ought to be reversed.

Respectfully submitted,

DOLPH, MALLORY, SIMON & GEARIN,
HALL S. LUSK,

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graph Company.*

W. D. FENTON,
JOS. E. FENTON,
BEN C. DEY, and
KENNETH L. FENTON,

*Solicitors for Appellant Southern Pacific
Company.*

IN
**The United States Circuit
Court of Appeals**
For the Ninth Circuit
May Term, 1914

WESTERN UNION TELEGRAPH CO.

AND

SOUTHERN PACIFIC CO.

APPELLANTS

VS.

POSTAL TELEGRAPH CO.

APPELLEE

Brief of Appellee

**APPEAL FROM THE DECREE OF THE DISTRICT COURT OF THE
UNITED STATES FOR THE DISTRICT OF OREGON**

**FREDERICK V. HOLMAN and
ALFRED A. HAMPSON**

Solicitors for Appellee and of Counsel

IN
**The United States Circuit
Court of Appeals**
For the Ninth Circuit
May Term, 1914

WESTERN UNION TELEGRAPH COMPANY
and SOUTHERN PACIFIC COMPANY,
Appellants,

vs.

POSTAL TELEGRAPH COMPANY,
Appellee.

Brief of Appellee

*Appeal from the Decree of the District Court of
the United States for the District of Oregon.*

STATEMENT OF THE CASE

This suit was begun in August, 1911, by the Postal Telegraph Company filing its bill of complaint against the Southern Pacific Company. It appears from the allegations in the original bill that the complainant is maintaining and oper-

ating a line of electric telegraph over the railroad right of way of the defendant in the State of Oregon. This telegraph line forms part of a general telegraph system extending through the states of California, Oregon, Washington and other states of the Union.

It was alleged that the defendant Southern Pacific Company controls and operates its railroad right of way under a lease from the Oregon & California Railroad Company, which received a land grant from the United States and that the railroad is a post road of the United States.

The part of complainant's telegraph line which forms the subject of this controversy extends from Eugene in the County of Lane, State of Oregon, to New Era, in the County of Clackamas, State of Oregon, a distance of 103 miles. This telegraph line was constructed in the year 1886 by Pacific Postal Telegraph-Cable Company, the predecessor in interest of the complainant. The telegraph poles were erected, in part on the railroad right of way, and in part on the land immediately adjoining it, so that the cross-arms and wires overhang the right of way. The line, as originally constructed, has been maintained and operated by the complainant and its predecessor in interest since the date of its original construction. It is alleged in the bill that this occupancy has been open, notorious, peaceable, adverse, continuous and uninterrupted so that the complainant has thereby acquired the inde-

feasible right to maintain, use, repair and reconstruct its telegraph line, as it now exists, in such manner as may be required of it in the proper performance of its corporate functions.

Finding it necessary to reconstruct the line, in order to replace worn out and defective material, and being prevented in this attempted reconstruction by the exercise of force on the part of the defendant Southern Pacific Company, the complainant sought relief from a court of equity. It prayed for a decree enjoining the Southern Pacific Company from interfering with it in the exercise of its rights to maintain and reconstruct this telegraph line.

To this bill the defendant Southern Pacific Company filed its answer, making certain admissions and denials, and pleading, as matter of affirmative defense, first, that the telegraph line in question was originally constructed by the predecessor in interest of the complainant under the authority of an order granted by the District Court of the District of Oregon in 1886. This order required the Receiver of the Oregon & California Railroad Company, which then operated and controlled the right of way in question, to permit the telegraph company to place certain poles upon the railroad right of way during the existence of the receivership. It was further alleged that the original entry was permissive and that the occupancy, after the termination of the receivership, continued to be per-

missive. By reason of the requirements of the Southern Pacific Company, it is alleged this permission was subsequently revoked.

The additional defense was pleaded that all of the matters involved in this suit were adjudicated in 1907 in a condemnation action brought by the Pacific Postal Telegraph-Cable Company against the Oregon and California Railroad Company and the Southern Pacific Company. This condemnation action involved a right of way for a new and distinct telegraph line over the right of way of the Oregon and California Railroad Company from the City of Portland to the Oregon-California state line, a distance of 366.61 miles.

After joining issue upon the answer of the Southern Pacific Company, the complainant proceeded to take testimony in support of the allegations in its bill, in New York, Chicago, and the State of Texas, and while engaged in taking testimony, entered into negotiations with the Southern Pacific Company for an amicable settlement of this suit. Such settlement was agreed upon between the complainant and the defendant Southern Pacific Company, involving not only the 103 miles of right of way covered by the original bill, but an adjustment of all right of way matters in dispute from the City of Portland to Ashland. These negotiations proceeded so far that a contract was prepared which in all essentials was satisfactory to both the complain-

ant and the defendant Southern Pacific Company, and which, after conferences between the attorneys of these two companies, was agreed upon by both parties as a final settlement and adjustment of all existing differences between them.

Before executing this contract, the Southern Pacific Company submitted the same, for its approval, to the Western Union Telegraph Company, because of a contract existing between the Southern Pacific Company and the Western Union Telegraph Company purporting to vest in the latter company certain exclusive rights and privileges for the construction and maintenance of telegraph lines upon the railroad right of way in question. The Western Union Telegraph Company refused to approve this contract and the Southern Pacific Company subsequently declined to execute it solely because of such refusal. Thereupon, the defense of this suit was taken over by the Western Union Telegraph Company.

The complainant, being advised of the fact that the proposed settlement of this litigation had been prevented by the Western Union Telegraph Company, filed a supplemental bill making this company a party defendant, setting forth the negotiations had with the Southern Pacific Company and the agreement reached with it, and requiring the Western Union Telegraph Company to show by what right it interfered with and attempted to prevent the settlement of this con-

troversy agreed upon between complainant and the Southern Pacific Company.

To this supplemental bill the Western Union Telegraph Company made answer, admitting that the proposed agreement between the Southern Pacific Company and the complainant was laid before it by the Southern Pacific Company for its consideration and approval, and further admitting that it declined to approve said proposed agreement, and in pursuance of the contract existing between it and the Southern Pacific Company, assumed and took over the defense of this suit.

In its answer the Western Union Telegraph Company pleaded a contract entered into between it and the Southern Pacific Company in October, 1901. This contract provides, in detail, the respective rights and obligations of the parties thereto in connection with the construction, maintenance and operation of telegraph lines over the railroad rights of way therein enumerated, among others, the right of way of the Oregon and California Railroad Company which is affected by this controversy. The ninth section of this contract provides as follows:

SECTION NINE.

Exclusive Right of Way. The Pacific Company, so far as it legally may, hereby grants and assures to the Telegraph Company the exclusive right of way along and under the lines and lands

and bridges of the railroads, and any branches or extensions thereof covered by this agreement, for the construction, maintenance and operation of lines of poles and wires and underground or other lines for commercial or public telegraph and public telephone uses or business, with the right to construct, at the Telegraph Company's own cost and expense, from time to time, such additional wires and lines of poles and wires as the Telegraph Company may require; the lines to be located on the railroad right of way, lands and bridges in such manner as the Pacific Company may designate. The Pacific Company agrees to clear and keep clear said right of way of all trees, undergrowth and other obstructions which may interfere with the construction and maintenance of the lines and wires provided for hereunder.

Provided always that, in protecting and defending the exclusive grant referred to in the foregoing paragraph hereof, the Telegraph Company may use and proceed in the name of the Pacific Company, or of any other companies owning the railroads in respect to which this contract is made, but shall indemnify and save it and them harmless from any and all damages, costs, charges and legal expenses incurred therein or thereby.

And the Telegraph Company covenants and agrees to satisfy and comply with any and all judgments or decrees which may be obtained

against the Railroad Company in respect to any of the matters in this section mentioned.

By its answer the Western Union Telegraph Company claimed the right to object to or prevent such or any settlement between the complainant and the Southern Pacific Company as might involve or interfere with or injuriously affect its own rights. To any other settlement made between the Southern Pacific Company and the complainant, the Western Union Telegraph Company claimed no right to object, unless its approval of such proposed settlement was made a condition upon which the Southern Pacific Company undertook to execute such agreement, in which case it claimed that it might withhold its assent and thereby prevent the execution of such agreement, whether it had any interest in or was to be affected by such agreement or not. It further said that it had the right to object to the execution of the agreement between the Southern Pacific Company and the complainant not only as to itself, but to object to the execution thereof by the Southern Pacific Company so far as such execution might injuriously affect, impair or destroy any of its vested rights.

Issue being joined upon the allegations of the supplemental bill and the answers of the defendants thereto, further testimony was taken, and thereafter the court entered a decree holding that the defense of the suit having been taken over

by the Western Union, and the Southern Pacific Company being but a nominal party, the controversy is reduced to the narrow limit as to whether the Western Union, under its contract with the Southern Pacific Company, can defeat the latter's negotiations with the Postal Company by simply refusing to approve the contract agreed upon. The lower court came to the conclusion that the clause of the contract between the Western Union Telegraph Company and the Southern Pacific Company, purporting to grant to the Telegraph Company the exclusive privilege of occupying the railroad's right of way for the maintenance of its telegraph lines, is against public policy and void. That, there being no interference with the rights of the Western Union either alleged or shown, it could not be injured by the consummation of these negotiations, and it ought not to be heard to interpose objections thereto. Based upon this opinion, a decree was entered authorizing the execution by the Southern Pacific Company of its proposed contract with the complainant and enjoining the Western Union Telegraph Company from interfering with the execution thereof. This decree, therefore, so far as the Western Union Telegraph Company is concerned, merely prohibits an interference with the execution of a contract, with the execution of which it has no contract right to interfere and which, when executed, can result in no interference with its properties or impairment

of its rights. So far as the Southern Pacific Company is concerned, the decree merely directs that it do what it is willing and has proposed doing, and, as will be hereafter shown, is merely declaratory of the existing rights of the complainant on its railroad right of way.

SPECIFICATIONS OF ERROR

The specifications of error in appellants' brief do not comply with the rule of this court requiring a particular statement of the points wherein the decree is alleged to be erroneous. An examination of the assignments of error shows that the points raised by these assignments resolve themselves into three classes:

First: As to whether the Western Union Telegraph Company was a proper party defendant in the litigation and properly brought before the court by the supplemental bill.

Second: As to whether the contract between the Western Union Telegraph Company and the Southern Pacific Company is void insofar as it attempts to create exclusive telegraph rights over the railroad right of way.

Third: As to the right of Western Union Telegraph Company to prevent a settlement of this suit by either active or passive interference with the settlement agreement reached by the real parties in interest.

Rule 11 of this court provides that errors not assigned will be disregarded. The argument of appellants, therefore, that appellee has acquired no prescriptive rights on the railroad right of way should be disregarded. It is answered, however, by appellee, with a view of showing that the decree is not open to criticism either so far as the technical accuracy of the record is concerned or so far as the substantial merits of the controversy are concerned.

BRIEF OF THE ARGUMENT

I.

**WESTERN UNION TELEGRAPH COMPANY
WAS A NECESSARY PARTY DEFENDANT AND
WAS PROPERLY BROUGHT BEFORE THE
COURT BY THE SUPPLEMENTAL BILL.**

Equity Rule 57. (The supplemental bill was filed before the new equity rules became effective.)

21 Encyc. of Pl. & Pr. 36;

Mellor v. Smither, 114 Fed. 116 at 120;

Curtis Davis & Co. v. Smith, 105 Fed. 949 at 951;

Chapman v. Yellow Poplar Lumber Co., 143 Fed. 201 at 208 and 210;

Pomeroy's Equity Jurisprudence (3d Ed.), Sections 191 and 195.

II.

THE CLAUSE OF THE CONTRACT BETWEEN SOUTHERN PACIFIC COMPANY AND WESTERN UNION TELEGRAPH COMPANY PURPORTING TO GRANT EXCLUSIVE RIGHT OF WAY PRIVILEGES TO THE TELEGRAPH COMPANY IS AGAINST PUBLIC POLICY AND VOID.

- Transcript of Record, page 180;
United States v. Union Pacific R. R. Co.,
160 U. S. 1;
Georgia R. & B. Co. v. Atlantic Postal Telegraph-Cable Company, 152 Fed. 991 at 998;
Western Union Telegraph Co. v. B. & O. Tel. Co., 23 Fed. 12;
Pacific Postal Telegraph-Cable Co. v. Western Union Telegraph Co., 50 Fed. 493 at 495;
Western Union Tel. Co. v. B. & O. Tel. Co., 22 Fed. 133 at 134;
B. & O. Tel. Co. v. Western Union Telegraph Co., 24 Fed. 319.

III.

INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE SETTLEMENT OF THIS LITIGATION WAS PROPERLY ENJOINED.

- Pomeroy's Equity Jurisprudence (3d Ed.),
Sections 1339 and 1351;

Watson v. Sutherland, 72 U. S. 74 at 79;
 Henry, Lee & Co. v. Cass County Mill &
 Elevator Co., 42 Ia. 33;
 American Law Book Co. v. Edward
 Thompson Co., 84 N. Y. Sup. 225;
 Chesapeake & O. C. A. Co. v. Fire Creek
 Coal & Coke Co., 119 Fed. 937 at 947;
 Nashville C. & St. L. Ry. Co. v. M'Connell,
 82 Fed. 65 at 75 and 81;
 Flaccus v. Smith, 199 Pa. St. 128.

IV.

THE DECREE THAT SOUTHERN PACIFIC
 COMPANY EXECUTE THE CONTRACT WITH
 POSTAL TELEGRAPH COMPANY WAS A
 VALID EXERCISE OF THE EQUITABLE
 POWER OF THE COURT:

- (A) THE SOUTHERN PACIFIC COMPANY
 WAS WILLING TO EXECUTE THE
 CONTRACT.

Transcript of Record, page 328.

- (B) THE SOUTHERN PACIFIC COMPANY
 MADE THE APPROVAL OF WESTERN
 UNION TELEGRAPH COMPANY A
 CONDITION PRECEDENT ONLY SO
 FAR AS WAS REQUIRED BY THE
 VOID PROVISIONS OF ITS CONTRACT.

Transcript of Record, pages 330, 161
 and 165.

- (C) THE ASSENT OF WESTERN UNION
 TELEGRAPH COMPANY WAS NOT A

PREREQUISITE SINCE IT HAD NO
VALID INTEREST IN THE SUBJECT
MATTER.

Transcript of Record, page 162.

22 Cyc. 742;

Vol. 5 Pomeroy's Equity Jurisprudence
(3d Ed.), Sections 12 and 263;

Parsons v. Marye, 23 Fed. 113 at 121;

In re Lennon, 166 U. S. 548 at 555;

Whitecar v. Michenor, 37 N. J. E. 6 at 7
and 14;

Pokegama S. P. Lumber Co. v. Klamath R.
L. & I. Co., 86 Fed. 528 at 533;

Weimer v. Louisville Water Co., 130 Fed.
251 at 256.

**(The foregoing questions are the only
ones presented by the assignment of
errors.)**

V.

POSTAL TELEGRAPH COMPANY HAS AC-
QUIRED A PRESCRIPTIVE RIGHT TO THE
EASEMENTS RECOGNIZED BY THE CON-
TRACT WITH THE SOUTHERN PACIFIC
COMPANY.

Boyce v. Missouri Pacific R. R. Co., 168
Mo. 583;

Texas & Pacific R. R. Co. v. Scott, 77 Fed.
726 at 730;

Spottiswoode v. Morris & Essex R. R. Co.,
61 N. J. L. 322 at 332;

Hume v. Rogue River Packing Co., 51 Ore.
237 at 252;

Curtis v. LaGrande Water Co., 20 Ore. 34
at 43;

Western Union Telegraph Co. v. Pol-
hemus, 178 Fed. 904 at 905.

VI.

THE ORIGINAL ENTRY BY POSTAL TELE-
GRAPH COMPANY, IF PERMISSIVE, TERMI-
NATED WITH THE RECEIVERSHIP, AND THE
OCCUPANCY SINCE THE TERMINATION OF
THE RECEIVERSHIP HAS BEEN ADVERSE.

Transcript of Record, pages 41 to 48, in-
clusive;

Transcript of Record, pages 274, 275, 276,
296, 308, 311;

Claflin v. Boston & Albany R. R. Co., 157
Mass. 489;

Ball v. Campbell, 6 Idaho 754 at 759;

Gregory v. U. S., 10 Fed. Cas. 1195 at 1197;

Coon v. Froment, 49 N. Y. Sup. 305 at 306;

City of Chicago v. Stearns, 105 Ill. 554 at
558.

VII.

THE DEFENSE OF RES ADJUDICATA WAS
NOT ESTABLISHED.

24 A. & E. Encyc. of Law, 724 (and cases
cited in note 1, page 725);

24 A. & E. Encyc. of Law, 773 (and cases cited in note 1);

24 A. & E. Encyc. of Law, 781;

Postal Telegraph-Cable Co. v. O. S. L. R. Co., 104 Fed. 623 at 625;

O. S. L. R. Co. v. Postal Telegraph-Cable Co., 111 Fed. 842 at 844.

(The foregoing are the only additional points presented in appellant's brief, and not raised by the assignment of errors.)

VIII.

THE COMPLAINANT, BEING ENGAGED IN A PUBLIC SERVICE, INTERFERENCE WITH ITS NECESSARY EASEMENTS WILL BE ENJOINED.

Roberts v. Northern Pacific Ry. Co., 158 U. S. 1 at 11;

Northern Pacific Ry. Co. v. Smith, 171 U. S. 260 at 271;

Northern Pacific Ry. Co. v. Murray, 87 Fed. 648;

Fresno St. Ry. Co. v. Southern Pacific R. R. Co., 135 Cal. 202;

Southern California Ry. v. Slauson, 138 Cal. 342;

Donahue v. El Paso & S. W. R. R. Co., 214 U. S. 499.

IX.

THE TESTIMONY SHOWS:

- (A) THAT THE POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT ON THE SOUTHERN PACIFIC RIGHT OF WAY.

See testimony of the witnesses Anand, Durkee, Blake and Coyle, beginning respectively on pages 273, 276, 295 and 300 of Transcript of Record.

- (B) THAT ITS CONTINUED MAINTENANCE AND USER OF EXISTING EASEMENTS WILL CONSTITUTE NO INTERFERENCE WITH THE SOUTHERN PACIFIC COMPANY OR THE WESTERN UNION TELEGRAPH COMPANY.

See testimony of witnesses Tuttle, Baker, Beaumont, McNicol, McReynolds, Smith and Stevenson, beginning respectively on pages 216, 222, 225, 228, 234, 239 and 242 of the Transcript of Record. (The foregoing testimony relates principally to the question of interference by induction.)

See also the testimony of the witnesses Lynch, Parrett, Sutherland and Capen at pages 285, 303, 313 and 314 of Transcript of Record; and also complain-

ant's Exhibit 19 at page 338, and Exhibit X at page 365 of Transcript of Record.

- (C) AN AGREEMENT BY SOUTHERN PACIFIC COMPANY TO TERMINATE THE LITIGATION AND A MALICIOUS INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE EXECUTION OF THIS AGREEMENT.

Testimony of the witness Overbaugh at page 325, and complainant's Exhibits 21 and 22 at pages 344 and 353 of Transcript of Record.

X.

THIS COURT, HAVING ACQUIRED JURISDICTION, SHOULD ENTER A DECREE DETERMINING THE LITIGATION BY EITHER:

- (A) AFFIRMING THE DECREE OF THE LOWER COURT, OR
- (B) ENJOINING INTERFERENCE WITH THE NECESSARY MAINTENANCE BY COMPLAINANT OF EASEMENTS ACQUIRED BY PRESCRIPTION AND USED IN THE PERFORMANCE OF A PUBLIC SERVICE.

ARGUMENT

Appellee makes two principal contentions in the argument of this suit:

First: It contends that no error arose in the lower court which justifies a reversal or modification of the decree.

Second: It contends that, even if it be held that there was technical irregularity in the decree of the lower court, nevertheless this court, in any modification of that decree that it may find necessary, should make a change in form only and by a modified decree should afford to the appellee the same protection of its rights as was extended to it by the lower court and to which, under the facts of this case, it is clearly entitled.

I.

WESTERN UNION TELEGRAPH COMPANY WAS A NECESSARY PARTY DEFENDANT AND WAS PROPERLY BROUGHT BEFORE THE COURT BY THE SUPPLEMENTAL BILL.

By demurrer to the supplemental bill, and in the argument, the point was raised by appellants that Western Union Telegraph Company is not a proper party defendant in this cause and that the complainant is entitled to no relief against it. The facts of this case should not be lost sight of in a consideration of this point. Litigation was pending between the complainant and the

Southern Pacific Company. This had been settled by a carefully prepared compromise agreement. The execution of this agreement was prevented by the Western Union Telegraph Company and a continuance of the litigation enforced by it. The Western Union Telegraph Company assumed the defense of this litigation and is now undertaking this defense by appeal in this court. Is not a party which prevents the settlement of pending litigation between two other parties and which takes over the defense thereof from one of them, a proper and necessary party to the suit which, because of its acts alone, continues to exist?

The supplemental bill in this cause was filed August 7, 1912, prior to the time the new equity rules became effective. Rule 57 of the old rules, then controlling, provided as follows:

“Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), **or for any other reason a supplemental bill, or a bill in the nature of a supplemental bill, may be necessary** to be filed in the cause, leave to file the same may be granted by any judge of the court on any rule day, upon proper cause shown and due notice to the other party.” (Emphasis ours.)

An examination of the supplemental bill discloses the fact that the filing of this bill was properly permitted under rule 57 for two reasons:

First: There was a change of interest in the parties to the original suit. The original suit was brought upon the correct theory that the only necessary parties thereto were the complainant and the defendant Southern Pacific Company. While this suit was pending and subsequent to the agreement being reached which resulted in a settlement of all existing differences between these original parties, the Southern Pacific Company made an unwilling recognition of interest in the right of way in Western Union Telegraph Company. This, so far as the complainant is concerned, created a new party in interest to this controversy as effectually as if the Southern Pacific Company had alienated its right of way or an interest therein subsequent to the commencement of the original suit. It is true that the only interest recognized by the Southern Pacific Company was an interest based upon the exclusive features of a contract which the lower court properly held to be void as against public policy. But that fact did not appear and could not be determined until the Western Union Telegraph Company was brought before the court and that contract submitted to the court for its consideration.

Second: The prosecution of the litigation between the complainant and the Southern Pacific

Company had ceased because they had reached a settlement of their differences. The execution of this settlement was prevented by an interloper, Western Union Telegraph Company. This settlement and this act of the Western Union Telegraph Company transpired subsequent to the filing of the original bill. These facts justified the filing of such bill, in which the principal relief asked for is a discovery as against the Western Union Telegraph Company of its right to interfere in the pending cause.

The general rule on this point is laid down in Vol. 21 Encyclopaedia of Pleading and Practice, page 36, as follows:

“In a suit in equity new parties, when necessary, may be added by supplemental bill, where the proceedings are in a state in which the object cannot be obtained in any other way. A supplemental bill is proper for the purpose of introducing parties who although they should have been made parties to the original bill were omitted, or for the purpose of bringing in parties who were not originally proper parties but have become proper or necessary parties *pendente lite*.”

A general consideration of this subject is found in the case of Mellor v. Smither, 114 Fed. 116 at page 120, where the court said:

“The correct decision of this case turns on the question whether or not the plaintiff at the time he filed his bill had a cause of action. If he had no cause of action, then he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill. 1 Beach, Mod. Eq. Prac., Sec. 496; *Straughan v. Hallwood*, 30 W. Va. 274, 4 S. E. 394, 8 Am. St. Rep. 29; *Hill v. Hill*, 10 Ala. 527. But where a cause of action exists at the filing of the bill which is defectively presented by the bill, the defects may be remedied by amendment (Equity Rules 28, 29), and matters occurring after the filing of the bill may be presented by supplemental bill (Equity Rule 57; *Jenkins v. Bank*, 127 U. S. 484, 486; 8 Sup. Ct. 1196, 32 L. Ed. 189; *Hoxie v. Carr*, 1 Sumn. 173, Fed. Cas. No. 6,802). Where material facts have occurred subsequent to the beginning of the suit, the court may give the plaintiff leave to file a supplemental bill, and where such leave is given the court will permit other matters to be introduced into the supplemental bill which might have been incorporated in the original bill by way of amendment. *Stafford v. Howlett*, 1 Paige, Ch. 200. But, in cases where the plaintiff had no cause of action when the bill was filed, neither amendment nor supplemental bill presenting occurrences subsequent

to the filing of the bill can prevent its dismissal."

In the case of *Curtis Davis & Co. v. Smith*, 105 Fed. 949, the syllabus is as follows:

"Where, pending a suit in equity for infringement of a trade-mark, complainant sold its business, good will, and trade-marks to another, but did not convey its right to recover for past infringement, it parted with only a part of its interest in the suit, and the court, having acquired jurisdiction, will retain it to dispose of all the questions involved, and will permit the filing of a supplemental bill to bring the grantee before it as a party complainant."

And at page 951 the court quoted from *Daniell's Chancery Practice* as follows:

"If, after a suit was instituted, any circumstance occurred which, without abating the suit, occasioned an alteration in the interest of any of the parties, or rendered it necessary that new parties should be brought before the court, the proper method of doing it was by supplemental bill. * * * * If a plaintiff, suing in his own right, made such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he brought the alienee before the court by supplemental bill."

In the case of *Chapman v. Yellow Poplar Lumber Co.*, 143 Fed. 201, the syllabus is in part as follows:

“Complainant brought a suit in equity against a corporation and certain individuals to obtain a reconveyance of standing trees to which he had an equitable title, which he had conveyed to the individual defendants for the benefit of the corporation. Pending the suit a compromise agreement was made between complainant and the corporation, by which the latter agreed to ‘forthwith’ cause a reconveyance to be made of certain of the trees, and of the remainder on payment of a sum for which they stood as security; it was also stipulated that the cause should stand continued to await the final determination of an action at law pending between the parties for the purpose of enabling complainant, if necessary, to enforce the latter conveyance. Such conveyance was subsequently made, but no conveyance was made of the trees, which were to be reconveyed forthwith; but, on the contrary, the corporation caused certain of them to be cut and converted the same to its own use. Held, that the compromise agreement had the effect of a consent decree, and under its terms complainant had the right, by a supplemental bill in the original cause, not only to require such conveyance, but also an accounting for the trees so converted as ancillary relief, espe-

cially in view of the fact that his title to the trees was equitable and would not sustain an action at law for the conversion."

And at page 210 of the opinion, the court discussed the sufficiency of the supplemental bill as follows:

"As to the sufficiency of this amended and supplemental bill, it may be said that no demurrer was interposed to it, and, if the bill was insufficient, it should have been demurred to. But we have no doubt of the legal sufficiency of the bill, and no doubt of the jurisdiction of the court to entertain it in this suit. Indeed, the matter appears to us to be peculiarly a subject for cognizance by way of a supplemental bill, as arising pending the suit, by the act of the principal defendant and affecting the sufficiency of the relief prayed for in the original bill. 4 Minor's Inst., p. 1262 (1131), and authorities there cited."

Apply these principles to the facts of this case. We find that the Western Union Telegraph Company took over the entire defense of this cause. It thereby upheld the Southern Pacific Company in its threatened acts of aggression which preceded the compromise agreement with the complainant. The Southern Pacific Company, by its passivity, recognized the rights claimed by the Western Union Telegraph Company. The attitude of the Western Union Telegraph Company is based

upon a claim of interest in the subject matter of the controversy. Under the authority of the rules laid down in the foregoing cases, the filing of the supplemental bill and the bringing in of the Western Union Telegraph Company as a party defendant were clearly necessary and proper. The complainant was entitled to the relief prayed for against the Western Union Telegraph Company in the event that the allegations of the supplemental bill should be found to be true.

Remember also that the principal relief prayed for by the supplemental bill was for a discovery against the Western Union Telegraph Company. The complainant had the right to be advised by virtue of what rights Western Union Telegraph Company attempted to intervene and prevent the settlement agreed upon by complainant and the Southern Pacific Company. The right to a discovery is one of the most important rights peculiarly within the province of a court of equity. This point is discussed in Pomeroy's Equity Jurisprudence in Section 191, as follows:

“In one most important sense ‘discovery’ is not peculiar to and does not belong to the auxiliary jurisdiction. Every suit in equity brought to obtain relief is or may be most truly a suit for discovery; for the complainant may always, and generally does, by the allegations and interrogatories of his bill, call upon and force the defendant to disclose by his answer under oath facts and circumstances

within his knowledge in support of the plaintiff's contention; and the plaintiff may perhaps go to the hearing, relying largely, and sometimes wholly, upon the evidence thus furnished by the compulsory admissions of the defendant's answer. This incident of chancery pleading, so entirely at variance from the common-law practice, by which the conscience of the defendant could be probed, and which was so powerful an instrument in eliciting the truth in judicial controversies, has been essentially adopted by the reformed system of procedure. Under that procedure this chancery mode of pleading for the purpose of eliciting facts as well as presenting issues has been essentially applied to all equitable suits, except those causes of action in which the defendant's admissions might expose him to criminal prosecution, penalties, and the like. * * * * The bill for a discovery is proper, either when the complainant therein has no other proof than that which he expects to elicit by its means from the defendant, or when he needs the matters thus disclosed to supplement and aid other evidence which he furnishes; or indeed whenever the court can fairly suppose that facts and circumstances discovered by means of the bill can be in any way material to the complainant therein in maintaining his cause of action or defense in a suit."

See also the discussion in Section 195 where the following language is used:

“As this auxiliary jurisdiction was contrived to supply a great defect in the ancient common-law methods, which was a constant source of wrong to suitors at law, and as it was intended to promote right and justice, discovery was, from the outset, favored by courts of equity; and as a general doctrine, it will always be enforced, unless some recognized and well-established objection exists in the particular case to prevent or to limit its operation.”

The Western Union Telegraph Company became a proper party to this litigation when it interposed objections preventing the consummation of the settlement agreement between the complainant and the Southern Pacific Company. It became a necessary party when it advanced a claim of interest in the subject matter of this controversy and assumed the defense of this suit in behalf of the principal defendant herein. And for purposes of discovery it immediately became a proper and necessary party defendant when it advanced a claim of interest in the subject matter and a right to defend the litigation.

The trouble with the rules laid down and the authorities cited in appellants' brief is that they do not measure up to the facts of this case. Concede, as they contend, that a supplemental bill

must not state a new cause of action. Then examine the supplemental bill and particularly the prayer for relief. It appears from the allegations of the supplemental bill that the settlement between the Southern Pacific Company and the Postal Telegraph Company was at a standstill because of the Western Union Telegraph Company. The facts in question were fully pleaded. The complainant then asks, first, for a writ of subpoena directed to the Western Union Telegraph Company; second, for a discovery by this company of its claim of interest in the controversy; third, **for the relief prayed for in the original bill**; and fourth, that the settlement contract be made the basis of a decree adjudicating the rights of the parties. (See Transcript of Record, p. 142.)

Appellee did not ask the court to decree the execution of this contract, as stated by appellants on page 21 of their brief, although the court, quite properly, subsequently did decree that it be executed. It asked for a discovery by the Western Union Telegraph Company and for the relief prayed for in the original bill. It also contained a suggestion, afterwards adopted by the court, that the tentative agreement serve as a guide in preparing the decree. These facts being true, it was not improperly filed within the principles alleged by appellants.

THE CLAUSE OF THE CONTRACT BETWEEN SOUTHERN PACIFIC COMPANY AND WESTERN UNION TELEGRAPH COMPANY PURPORTING TO GRANT EXCLUSIVE RIGHT OF WAY PRIVILEGES TO THE TELEGRAPH COMPANY IS AGAINST PUBLIC POLICY AND VOID.

The record in this cause shows that the only interest in this controversy possessed by the Western Union Telegraph Company is the interest created by the agreement between it and the Southern Pacific Company purporting, among other things, to confer upon the Western Union Telegraph Company, certain exclusive right of way privileges upon the railroad rights of way of the Southern Pacific Company. In the consideration of this defense and in the construction of this contract, the lower court held that this particular provision of the contract was contrary to public policy and void. This finding of the court is presented as error in the second assignment of appellants. The ruling of the court was obviously correct and is not attacked in appellants' brief. Appellee merely calls attention to, without quoting from the cases where the same question has been determined, cited under the second point in its brief of the argument.

III.

INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE SETTLEMENT OF THIS LITIGATION WAS PROPERLY ENJOINED.

It is conceded that the complainant and the defendant Southern Pacific Company have reached a settlement of all differences between them. It is because of interference on the part of Western Union Telegraph Company that this litigation was continued in the lower court and is now brought before this court. The record discloses no real interest in this controversy on the part of Western Union Telegraph Company. Its only interest is that created by the provisions of a contract which have repeatedly been held to be against public policy and therefore void. Its real interest in fostering litigation and attempting to prevent the Postal Telegraph Company from rebuilding its line is so obvious that "he who runs may read."

The decree of which it here complains affects its interest in no way. The decree provides that it, "its officers, servants, agents, employes and counsel, are hereby enjoined and restrained from interfering with the execution of" the contract between the Southern Pacific Company and the complainant. As has already been shown, it has no right, under contract, to interfere with the execution of this agreement. This agreement in no way affects its physical properties. It appears

from the record that the complainant is merely asking to continue the existence of what has existed without interruption since 1886, without interference with the properties of the Western Union Telegraph Company. The Western Union Telegraph Company appears in this case, therefore, merely as a meddlesome interloper attempting to prevent the execution of a contract between the Postal Telegraph Company and the Southern Pacific Company entered into between them in a spirit of fairness and in an attempt to adjust their differences without burdening the courts with unnecessary litigation. It was a proper exercise of the equitable power of the court when such acts on the part of the Western Union Telegraph Company were enjoined. The fundamental principle of equity jurisdiction which justifies this part of the decree is stated in Pomeroy's Equity Jurisprudence, Section 1338, as follows:

“In determining whether an injunction will be issued to protect any right of property, to enforce any obligation, or to prevent any wrong, there is one fundamental principle of the utmost importance, which furnishes the answer to any questions, the solution to any difficulties which may arise. This principle is both affirmative and negative, and the affirmative aspect of it should never be lost sight of, any more than the negative side. The general principle may be stated as follows:

Wherever a right exists or is created, by contract, by the ownership of property or otherwise, cognizable by law, *a violation of that right will be prohibited*, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy. *The restraining power of equity extends, therefore, through the whole range of rights and duties which are recognized by the law, and would be applied to every case of intended violation, were it not for certain reasons of expediency and policy which control and limit its exercise.*" (Italics in text.)

* * * * * *

"It may therefore be stated as a general proposition, that whenever the equitable relief against mistake or fraud with respect to specific property, or the equitable remedy of enforcing trusts or fiduciary duties concerning specific property, or of enforcing any other equitable estates, interests, or claims in or to specific property, *requires the aid of an injunction*, a court of equity has jurisdiction and will exercise that jurisdiction, to grant an injunction." (Italics in text.) (Section 1339.)

The facts of this case measure up to these rules. Nor is specific authority lacking to show the inherent power in a court of equity to act by injunction, as the lower court has acted in this case.

In the case of *Watson v. Sutherland*, 72 U. S. 74 at 79, the court said:

“The absence of a plain and adequate remedy at law affords the only test of equity jurisdiction, and the application of this principle to a particular case, must depend altogether upon the character of the case, as disclosed in the pleadings. In the case we are considering, it is very clear that the remedy in equity could alone furnish relief, and that the ends of justice required the injunction to be issued.”

This court might well follow this principle as furnishing authority for the decree of the lower court enjoining interference on the part of the Western Union Telegraph Company.

The Western Union Telegraph Company appears in these proceedings as one not interested in the subject matter of the controversy, but attempting to intervene in the case and prevent the execution of a settlement between the original parties to the suit. It has been held that a voluntary agreement between the parties litigant as fully and finally determined the controversy as a verdict could do, and that after such agreement one not a party to the record should not be allowed to interpose and renew a controversy which has been settled between the parties to the record, either by verdict or voluntary agreement. (*Henry, Lee & Co. v. The Cass County Mill and Elevator Company*, 42 Ia. 33.)

There is a further line of authorities to which appellee wishes to call attention. These are those cases which lay down the doctrine that a court of equity will, by injunction, prevent a third person from interfering with or preventing the execution of contractual agreements between other persons.

The American Law Book Co. brought a bill in equity against the Edward Thompson Company seeking to restrain the defendant from taking steps to cause the subscribers to the encyclopedia of plaintiff to repudiate their subscriptions. The contention was made that the plaintiff had no remedy in equity because any party to a contract has the right to break it and pay damages, and that what the party can do, another person may ask him to do without restraint by injunction. It was also argued that there was no precedent for such an injunction as the plaintiff sought, but it was decreed by the court in this case in 84 N. Y. S. 225, at page 226, that:

“If there be no exact precedent for this injunction, none is needed. * * * * The invasion of a legal right being apparent, and the inadequacy of relief at law being clear, a case for injunctive relief is made out; and, indeed, direct authority for an injunction upon a very similar state of facts is not wanting.”

It was held in *Chesapeake & O. Coal Agency Co. v. Fire Creek Coal & Coke Co.*, 119 Fed. 942 at 947:

“If, then, the agent has obtained a special interest or property in the subject of the contract, has he not a right of action against a third party, whose wrongful acts prevents the delivery by his principal of the subject of the contract? And if he has, and such remedy is ineffective, for any of the reasons warranting the interposition of equity in ordinary cases, may not he appeal to a court of equity for protection of this interest? Suppose the individual defendants had wantonly and maliciously induced the defendant companies to violate their contract with the plaintiff, would it not have a right of action against them? Undoubtedly. See *West Virginia Transp. Co. v. Standard Oil Co.* (W. Va.), 40 S. E. 591, 56 L. R. A. 804. And if such right of action was ineffective, for any of the reasons authorizing a resort to equity, might it not ask an injunction to prevent the continuance of such interference. I think so. * * * * It makes no difference whether a man is wrongfully and maliciously induced to cease business relations with me, or whether he is maliciously and wrongfully prevented from doing so. The effect is the same. The means in either case are wrongful, and in either case the wrongdoer is liable, in so far as the injury is the natural and probable result of the wrongful acts.”

A similar principle was enunciated in the case of *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65. In this case certain ticket brokers or scalpers were enjoined from dealing in railroad tickets to the Tennessee Centennial Exposition in violation of the contracts contained in said tickets. At page 75 the court said:

“The second objection to the exercise of the injunctive process is what counsel in argument calls a ‘fundamental objection,’ based upon the fact that it is a novel application of the writ of injunction, not sanctioned by previous precedents. * * * * This argument, carried to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject.

“* * * * It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that, while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves

an extension of the remedy, and often a change in the form of the remedy.”

And further, at page 80, the court said:

“The case simply calls for an application of the injunctive process to prevent complainants’ business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights.”

In the case of *Flaccus v. Smith*, 199 Pa. St. 128 (48 Atl. 894), the court enjoined a labor union from enticing the employes of the complainant to break their contracts with the complainant by becoming members of the labor union. The theory of the court was based upon the following principle:

“Such an interference with it was an interference with his business, and, if unlawful, cannot be permitted. The court found that the interference was injurious to him, and, if allowed to continue, would utterly ruin his business. The damages resulting from such

an injury are incapable of ascertainment at law, and justice demands that specific relief be furnished in a court of equity. The test of equity jurisdiction is the absence of a plain and adequate remedy at law to the injured party, depending upon the character of the case as disclosed in the pleadings. If equity alone can furnish relief, the injunction must be issued. *Watson v. Sutherland*, 5 Wall. 79, 18 L. Ed. 580. With this test applied to the pleadings and the facts found by the learned judge in the court below, the decree which he made was proper."

The facts in this case show that the Southern Pacific Company was either induced or enticed to violate, or prevented from performing its contractual obligations to complainant by the malicious and unjustified interference of Western Union Telegraph Company. The contract between the complainant and Southern Pacific Company was actually entered into. There remained only the physical execution of the agreement setting that contract forth. By preventing this execution Western Union Telegraph Company came into this case as an obstructor of justice, and under the authority of the cases cited, such interference on its part was properly enjoined by the lower court.

IV.

THE DECREE THAT SOUTHERN PACIFIC COMPANY EXECUTE THE CONTRACT WITH POSTAL TELEGRAPH COMPANY WAS A VALID EXERCISE OF THE EQUITABLE POWER OF THE COURT:

(A) THE SOUTHERN PACIFIC COMPANY WAS WILLING TO EXECUTE THE CONTRACT.

It is shown by the testimony of complainant's witness Overbaugh, is admitted by the pleadings, and is practically conceded by the attorneys for the appellant, that the Southern Pacific Company was ready to execute the agreement set forth in the decree. The Southern Pacific Company is still willing to execute this agreement. The decree of the lower court requiring its execution is objectionable to the Western Union Telegraph Company and to it only, because of the dog-in-the-manger policy adopted by that company.

(B) THE SOUTHERN PACIFIC COMPANY MADE THE APPROVAL OF WESTERN UNION TELEGRAPH COMPANY A CONDITION PRECEDENT ONLY SO FAR AS WAS REQUIRED BY THE VOID PROVISIONS OF ITS CONTRACT.

The argument is made by the appellants that the contract between the Southern Pacific Com-

pany and the complainant has no vitality or legal force because a condition precedent to such contract was that the Western Union Telegraph Company assent thereto, and this it has never done. Appellee contends that this position is not supported by the record. The record shows that the Southern Pacific Company and the complainant formulated an agreement in settlement of their disputes. It further shows that this writing was submitted to the Western Union Telegraph Company for its approval, and that such approval was not given. But it nowhere appears that the Southern Pacific Company made a condition precedent to this agreement becoming effective, that Western Union Telegraph Company should give its assent. Appellee submits that the true condition as shown by the record, and as in fact it existed, was that Southern Pacific Company sought the approval of Western Union Telegraph Company only to protect itself against a claim that might be made by this company that Southern Pacific Company had violated its contract with Western Union Telegraph Company in entering into this settlement agreement with the complainant. There is nothing in the record to show that Southern Pacific Company had any interest in the attitude of Western Union Telegraph Company towards this agreement, except as it might be affected by the existence of the contract which the lower court determined to be void as against public

policy. The whole subsequent conduct of this litigation indicates to the contrary. Deeming it unwise to act in violation of the terms of its agreement with Western Union Telegraph Company until such agreement had been declared void by the courts, Southern Pacific Company did not physically execute its contract with complainant. But under the authority of the same clause which caused it to seek the approval of Western Union Telegraph Company, it threw the burden of the defense of this litigation upon that company when its assent to the settlement agreement was refused and the continuance of the litigation made necessary. The statement that the securing of this assent was a condition precedent to the settlement agreement becoming binding is not borne out by the record. The securing of this assent was made a condition precedent only so far as it might be required by the terms of the contract between the Southern Pacific Company and the Western Union Telegraph Company. This contract being invalid in this particular, the condition ceased to exist. This record shows a complete contract, without condition precedent, requiring for its consummation only a compliance with the decree of the lower court directing the physical execution of the writing into which the terms of the contract itself have been incorporated.

(C) THE ASSENT OF WESTERN UNION TELEGRAPH COMPANY WAS NOT A PREREQUISITE SINCE IT HAD NO VALID INTEREST IN THE SUBJECT MATTER.

It has already been shown that the contractual relation between Western Union Telegraph Company and Southern Pacific Company confers upon the former no right to intervene in this litigation by preventing the execution of the settlement agreement with Postal Telegraph Company. Nor can such consent be demanded by reason of any other conditions that exist. It is true that Western Union Telegraph Company has acquired certain valid rights upon the right of way of Southern Pacific Company, and it is undoubtedly true that it is entitled to protection of those rights. But it does not appear by the record that the proposed settlement between the complainant and Southern Pacific Company will in any way interfere with or impair the valid rights of Western Union Telegraph Company, nor can such fact be shown. The record shows that the complainant is merely seeking to continue in existence an easement which it has enjoyed without interruption for nearly thirty years. This easement has existed without interfering with the easement upon the railroad right of way also enjoyed by the Western Union Telegraph Company. This latter company appears, therefore, before this court, not seeking protec-

tion of its own rights, for with such rights there has never been nor can there be hereafter interference; it appears here for reasons best known to itself, and not appearing in the record, seeking to prevent the complainant from securing protection in the enjoyment of its rights in the manner voluntarily acceded to by the Southern Pacific Company, the real party in interest.

The decree of the court directed the execution of this settlement agreement for the reasons above shown. The agreement should be executed and the order of the court requiring its execution was proper.

By the decree in question the court followed the fundamental principle of equity jurisdiction that equity acts *in personam* and not *in rem*. By an order directed to the defendant, Southern Pacific Company, personally, it required the execution of the agreement which should be executed and carried into effect in order to protect the interests of the complainant.

In Volume 5, Pomeroy's Equity Jurisprudence, Section 12, the rule is stated:

"In the infancy of the court of chancery while the chancellors were developing their system in the face of a strong opposition, in order to avoid a direct collision with the law and with the judgments of law courts, they adopted the principle that their own remedies

and decrees should operate *in personam* upon defendants, and not *in rem*. The meaning of this simply is, that a decree of a court of equity, while declaring the equitable estate, interest or right of the plaintiff to exist, did not operate by its own intrinsic force to vest the plaintiff with the legal estate, interest or right to which he was pronounced entitled; it was not itself a legal title, nor could it either directly or indirectly transfer the title from the defendant to the plaintiff. A decree of chancery spoke in terms of personal command to the defendant, but its directions could only be carried into effect by his personal act. It declared, for example, that the plaintiff was equitable owner of certain land, the legal title of which was held by the defendant, and ordered the defendant to execute a conveyance of the estate; his own voluntary act was necessary to carry the decree into execution; if he refused to convey, the court could endeavor to compel his obedience by fine and imprisonment."

If, in equity, there exists a right on the part of the complainant to the enjoyment of the easements afforded to it by the agreement, the court was within its powers in decreeing the execution of this agreement. It is such an act as is performed by a court of equity every day in compliance with that basic principle of equity which

requires the court to enter a personal decree rather than one *in rem*. And this principle is not altered merely because the decree is in effect a mandatory injunction.

In 22 Cyc. at 742, the rule is laid down:

“Mandatory injunctions command the performance of some positive act. * * * *
There is no doubt as to the power of courts of equity to issue mandatory injunctions.”

In the case of *Parsons v. Marye*, 23 Fed. 113, at page 121, the rule is stated:

“Must we go into the elementary books to find warrant for such a process? Jeremy, in his *Equity Jurisdiction*, says: ‘An injunction is a writ framed *according to the circumstances of the case, commanding* an act which the court regards as essential to justice, or *restraining* an act which it considers contrary to equity and good conscience.’

“The mandatory injunction may be in the direct form of command, or in the direct form of prohibiting the refusal to do an act to which another has a right.” (*Italics in text.*)

In the leading case of *In re Lennon*, 166 U. S. 548, where by injunction the court enjoined the defendant, a locomotive engineer, from refusing to afford and extend facilities for an interchange of interstate business to a railroad that was employing engineers not members of the Brother-

hood of Locomotive Engineers, the statement is made at page 556:

“Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it. *Robinson v. Lord Byron*, 1 Bro. C. C. 588; *Hervey v. Smith*, 1 Kay & Johns, 389; *Beadel v. Perry*, L. R. 3 Eq. 465; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. New York & New Jersey Telephone Co.*, 42 N. J. Eq. 141.”

This decision is quoted with approval in the case of *Wiemer v. Louisville Water Co.*, 130 Fed. 251 at 256, and the same principle is recognized in *Whitecar v. Michenor*, 37 N. J. Eq. 6 at page 14.

The point is not new in this circuit. In the opinion written by Mr. Justice Morrow in the case of *Pokegama Sugar-Pine Lumber Co. v. Klamath River Lumber & Improvement Co.*, 86 Fed. 528, elaborate consideration is given to any objection which might be urged against the decree in the case at bar. At page 533 of the opinion, we find the statement:

“It is contended that the injunction, although preventive in form, was mandatory in effect, its execution resulting in a change in the status of the parties. This contention assumes that the court will recognize the respondent as asserting, at the time the bill was filed, a claim of possession to the property under a color of right to such possession, and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction.”

Appellee calls the particular attention of this court to the statement of Mr. Justice Morrow that “Equity will not permit a mere form to conceal the real position and substantial rights of the parties. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relation of the parties.”

Appellee conceives this to be a correct and forceful enunciation of the fundamental principle upon which equity jurisprudence is based.

It cannot see that the appellants in this case, either by their assignments of error or by their brief, have presented any reason or made any suggestion to this court which shows that the substantial rights of the parties to this controversy require anything other than an unqualified affirmance of the decree of the lower court.

V.

POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT TO THE EASEMENTS RECOGNIZED BY THE CONTRACT WITH THE SOUTHERN PACIFIC COMPANY.

The rights and easements which plaintiff is here seeking to have protected were acquired by it through the adverse possession maintained by it and its predecessor in interest. Theoretically, the statute of limitations does not apply to an easement, but by judicial interpretation the result is the same as if the statute did so apply, so that an adverse user of an easement for the period specified in the statute barring actions for the recovery of land, is now, by analogy, held to be a conclusive judicial presumption of a prescriptive right by a lost grant. (*Boyce v. Missouri Pacific R. R. Co.*, 168 Mo. 583.)

In the case of *Texas & Pacific Ry. Co. v. Scott*, 77 Federal 726, an easement for a right of way for a railroad was held to have been acquired by reason of the adverse possession of the right of

way during a period exceeding the limitation period. The court held that while there was no direct testimony as to a claim of right on the part of the company,

“there is the fact of the building of the railroad, necessarily at considerable expense, over this right of way, and its open, notorious, and continuous occupancy and use. The conceded facts show a quiet and usual control and use of this property every day for 36 years, while all outward indications point to a belief in the rightfulness and justice of the company’s possession. There was no special claim of right in words, but there was this general assumption of right by the acts and conduct of the company. There was no necessity for any special claim of right, for it was never questioned. We think it clear that Scott’s right of action against the company as to this easement existed in 1856, and continued all along after that time, and that, this right not having been asserted for 36 years, the company has, by limitation and prescription, acquired the right to an easement over the land, which cannot be interfered with by the plaintiff, either as purchaser or as heir at law of Scott.” (Texas & Pac. Ry. Co. v. Scott, 77 Fed. 730.)

So also the Supreme Court of New Jersey held as follows:

“The courts of this state, also, in deciding upon the effect of prescription as conferring a right to an easement which is not within the statute of limitations, but with respect to which twenty years’ adverse enjoyment has been adopted in analogy with the statute of limitations as raising a presumption of grant, have held that the presumption arising from an adverse use for twenty years is an irrebuttable presumption and confers a right which is equivalent to title in corporeal hereditaments.” (*Spottiswoode v. Morris & Essex R. R. Co.*, 61 N. J. Law 322 at 332.)

The same principle has been recognized by the Supreme Court of Oregon which held:

“The use and enjoyment which will give title by prescription to an easement or other corporeal right is substantially the same in quality and characteristics as the adverse possession which will give title to real estate; that is to say, as respects prescriptive title, it must be adverse, under claim of right, continuous, uninterrupted, open, peaceable, exclusive, and with the full knowledge and acquiescence of the owner of the servient tenement, and must continue for the full prescriptive period, and while the owner of the servient tenement is under no legal disability to assert his right.” (*Hume v. Rogue River Packing Company*, 51 Oregon 237 at 252.)

The test of the character of occupancy which will create a prescriptive right has been stated by the Supreme Court of Oregon in the following language:

“If its inception is permissive or under a license from the owner, it cannot avail to work an ouster. To effect that result, the possession taken must be open, hostile, and continuous; ‘he must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest.’ Under this rule, an adverse possession cannot grow out of a permissive enjoyment; and so speak the decisions without a dissentient voice, including this court.” Citing cases. (*Curtis v. LaGrande Water Co.*, 20 Oregon 34 at 43.)

As was said by the Circuit Court of Appeals for the Third Circuit, in the case of *Western Union Telegraph Co. v. Polhemus*, 178 Fed. 904 at 906:

“Now, the telegraph line being authorized, a recognized factor of commerce (*Pensacola Co. v. Western Union Co.*, 96 U. S. 1, 24 L. Ed. 708), and being a public use (*Western Union Co. v. Penna. R. R. Co.* [C. C.] 120 Fed. 371), and having been in use all these years, it is to be presumed that the right so to do, with reference to abutting landowners, was acquired

from the predecessors of these respondents who then owned the abutting lands here concerned, in which event due compensation for present and future use thereof was either paid to or waived by them."

VI.

THE ORIGINAL ENTRY BY POSTAL TELEGRAPH COMPANY, IF PERMISSIVE, TERMINATED WITH THE RECEIVERSHIP, AND THE OCCUPANCY SINCE THE TERMINATION OF THE RECEIVERSHIP HAS BEEN ADVERSE.

Appellants contend that appellee has acquired no prescriptive rights because its original entry was permissive. This question not having been presented in the assignment of errors, its consideration by this court is not a matter of right on the part of appellants. But appellee wishes an affirmance of the decree of the lower court, not only so far as its technical accuracy is concerned, but because this decree should be affirmed as an equitable adjustment of the rights of the interested parties. The original bill prayed for an injunction from interference by the Southern Pacific Company with the exercise by complainant of easements on the railroad right of way for a distance of 103 miles. If the original entry was permissive at all, it was permissive because of an order entered in the Circuit Court for the District of Oregon in 1886, requiring the Receiver of the Oregon & California Railroad

Company to permit the predecessor in interest of the complainant to enter upon the railroad right of way at certain specified points. An examination of this order shows two important facts:

First: That the places upon which entry was permitted are by no means co-extensive with those places where the complainant enjoyed easements for which it sought protection by the original bill.

Second: The order, by its terms, provided that the privileges "are granted merely for the time being and shall not in any event extend beyond the period during which the said railway company remains in the charge and under the control of this court by reason of the present receivership."

There is no evidence, therefore, to show under what authority the original entry was made by the complainant **except at the particular points enumerated in the court order above referred to.** As to all other points, upon the authority of the cases hereinbefore cited, the entry will be presumed to have been based upon a grant.

And even as to those points at which the original entry appears to have been permissive, **such permission was for a definitely defined time which has long since expired.** After the termination of the receivership the

complainant could not justify its occupancy upon the order of the court. By its express terms this order ceased to be effective when the receivership ended. After the termination of the receivership the rights of the parties must be determined as if this order had never been entered. There being no evidence to indicate what relationship existed between the parties after the termination of the receivership, the principle again becomes controlling that the character of the occupancy not being shown, it will be presumed to have been based upon a grant.

But without this presumption, and in the absence of this principle, no such permissive occupancy has been shown as is sufficient to prevent the acquiring of a prescriptive right. If the doctrine contended for by appellants be recognized, no prescriptive right could ever be acquired. Practically every adverse occupancy that endures for the prescriptive period is permissive in that no positive steps to dispossess are taken. But the permission referred to presupposes something more positive than a mere quiescence. It involves an affirmative act. In order that the acquiring of a prescriptive right be prevented there must be a knowing and active extension of privilege to the occupant and the reception of such privilege by him.

In the case of *Claflin v. Boston & Albany R. R. Co.*, 157 Mass. 489, it was held that where the right to use a farm crossing of a railroad acquired by

reservation in the conveyance of the right of way terminated with the death of plaintiff's grantor, the prescriptive right to continue such use cannot be acquired in less than twenty years. It is apparent from the petition in this case that if the twenty years had elapsed, the court would have held that a prescriptive right was acquired even though the right as originally existing was based, not upon adverse user, but upon a reservation in the original grant.

The permissive enjoyment referred to in the LaGrande Water Company case, *supra*, means a decided assent, an affirmative act with a knowledge of what is done under the permission. As was said by the Supreme Court of Idaho in the case of *Ball v. Campbell*, 6 Idaho 754 at 759:

“Permission implies leave, license, consent.”

The word “permit” is defined in the case of *Gregory v. U. S.*, 10 Fed. Cases, 1195 at 1198, as follows:

“The word ‘permit’ is defined thus: ‘To grant permission, liberty or leave; to allow; to suffer; to tolerate; to empower; to license; to authorize.’ The word ‘suffer’ is defined thus: ‘To allow; to admit, to permit.’ The word ‘admit’ is defined thus: ‘To permit; to suffer; to tolerate.’ The word ‘allow’ is defined thus: ‘To suffer; to tolerate.’ The word

'tolerate' is defined thus: 'To allow so as not to hinder; to permit as something not wholly approved; to suffer; to endure; to admit.' Every definition of 'suffer' and 'permit' includes knowledge of what is to be done under the sufferance and permission, and intention that what is done is what is to be done."

There is no permissive enjoyment within the meaning of the rule in the LaGrande Water Company case unless such permissive enjoyment is one licensed or granted or authorized or sanctioned within the meaning of the rule laid down in the case of *Coon v. Froment*, 49 N. Y. Sup. 305 at 306, where the court said:

" 'To permit' is * * * * equivalent to 'to give leave,' 'to license,' 'to warrant in writing,' 'to grant,' 'to empower,' 'to authorize,' 'to sanction.' "

If permission be given the meaning of mere quiescence the principle would be, in effect, destructive of the principle of adverse possession. There are few prescriptive rights acquired by force of arms.

See also the case of *City of Chicago v. Stearns*, 105 Ill. 554 at 558, where the court refers to the definition in Webster's dictionary of the words "permit," "allow" and "suffer," saying:

" 'Permit' is the most positive, denoting a decided assent."

But in the case at bar, as shown by the testimony to which attention was directed in the brief of argument, there was no affirmative act on the part of the Oregon & California Railroad Company or the Southern Pacific Company extending to the complainant or its predecessor in interest any permissive rights in this right of way. They took the rights which they are here seeking to protect, occupied these rights openly, notoriously and continuously for nearly thirty years, and the question of permissive enjoyment is raised merely because no other point of attack suggests itself.

VII.

THE DEFENSE OF RES ADJUDICATA WAS NOT ESTABLISHED.

One of the affirmative defenses set up by the Southern Pacific Company in its answer is that of *res adjudicata*. This question is also presented in appellants' brief as a fact indicating an admission by the appellee of the non-existence of its rights over the right of way of the Southern Pacific Company.

In 24 Am. & Eng. Encyc. of Law at 724, it is said:

"The persons between whom a judgment or decree in a suit is conclusive in a subsequent suit are the parties to the prior suit and their privies, and as a general rule it is con-

clusive only between them. The mere fact that a person had an interest in the subject-matter of the prior suit will not render the judgment or decree therein conclusive upon him."

At page 773 the rule is stated:

"A judgment is not *res Judicata* as to a question not appearing upon the face of the record or shown by extrinsic evidence to have been determined in the action."

At page 781 it is stated:

"The test of identity is found in the inquiry whether the same evidence will support both actions."

Apply these general principles to the facts of this case and we find that the proceeding brought in 1907 was an action at law brought by the Pacific Postal Telegraph-Cable Company, a New York corporation, against the Oregon & California Railroad Company and the Southern Pacific Company for the purpose of acquiring by condemnation an easement to construct a telegraph line from the City of Portland to the state line between the States of Oregon and California. An examination of the complaint in that case, set forth in defendant's answer, will show that an absolutely different right was therein sought to be acquired from the right here claimed by appellee. At the very time this right was

sought by Pacific Postal Telegraph-Cable Company, appellee was the possessor and user of the rights which form the subject of this controversy. So it appears that the parties to these different controversies were different, and that the subject matter was different. It is also obvious, under the test laid down in the American & English Encyclopaedia of Law, that the evidence which would support a condemnation proceeding for a right to build a new telegraph line would not support a claim of a prescriptive right to maintain certain poles and overhanging cross-arms of the nature here sought to be protected. The theory is exploded by a clear statement of the facts.

The mere fact that the Pacific Postal Telegraph-Cable Company and the appellee are affiliated concerns (and they are affiliated) does not alter the principle. This court has already had occasion to consider the relationship between the different corporations making up the system known as the Postal Telegraph-Cable System. It has already been held that the close inter-corporate relationship which exists between these different companies will not cause one of them to be denied the rights to which it is otherwise entitled. *Postal Telegraph-Cable Co. v. O. S. L. R. Co.*, 104 Fed. 623 at 625; *O. S. L. R. Co. v. Postal Telegraph-Cable Co.*, 111 Fed. 842 at 844.

The Pacific Postal Telegraph-Cable Company acquired a prescriptive right over the Southern

Pacific right of way. This right it conveyed to the appellee, the Postal Telegraph Company of Oregon. Thereafter, the Pacific Postal Telegraph-Cable Company sought to acquire a new easement on the Southern Pacific right of way by condemnation proceedings. The reasons which may or may not have prompted it to abandon this case, after the verdict of the jury, have absolutely no bearing upon this controversy and can have been injected into this argument for no other purpose than to prejudice this court against the appellee. By bringing this condemnation action the Pacific Postal Telegraph-Cable Company in no way referred to or made admissions against the rights then existing in favor of and used by the appellee. Nor does it need any citation of authority to show that it could not have made admissions binding upon the appellee, an entirely distinct corporation, even had it attempted so to do.

VIII.

THE COMPLAINANT, BEING ENGAGED IN A PUBLIC SERVICE, INTERFERENCE WITH ITS NECESSARY EASEMENTS WILL BE ENJOINED.

The court should not lose sight of the fact that in this case the public has an interest. This is not a controversy between one private person and another private person, but is a controversy in which a public utility corporation is attempt-

ing to protect the rights necessary to the performance of its public service. It is, of course, not contended that a corporation engaged in performing a public service is entitled to take the private property of another without compensation. But the courts for many years have recognized the doctrine that when a company engaged in the performance of a public service has taken and used property, whether with compensation or without compensation, then the interest of the public is of such a nature that the property owner will not be permitted to maintain either trespass or ejectment against the corporation. By a parity of reasoning the corporation will be entitled to an injunction preventing interference with the easements necessary to be exercised in affording its service to the public. The leading case on this point is the case of *Roberts v. Northern Pacific Railway Co.*, decided by the Supreme Court of the United States in 1894, and reported in 158 United States at page 1. At page 11 the court said:

“So, too, it has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive and permits them to go on and expend large sums in the work, he will be estopped from maintaining either tres-

pass or ejectment for the entry, and will be regarded as having acquired therein and be restricted to a suit for damages." Citing cases.

The same principle has been repeatedly recognized and attention is called to the cases of *Northern Pacific Ry. Co. v. Smith*, 171 U. S. 260 at page 271; *Northern Pac. Ry. Co. v. Murray*, 87 Federal 648; *Fresno St. Ry. Co. v. Southern Pacific Railroad Company*, 135 California 202; *Donahue v. El Paso & S. W. R. R. Co.*, 214 U. S. 499.

Under the authority of these decisions, even had the original entry of the appellee been wrongful (as it was not), and even had it acquired no prescriptive rights (although it has), nevertheless it would be the duty of a court of equity to protect it from interference with the operation of this telegraph line which it is necessary for it to use in performing that duty which, as a common carrier, it owes to the public. And should this court for any reason find it necessary to modify the decree of the lower court, it should nevertheless enter a decree which would protect the appellee in the continued user of the easements it is now using, even though the payment of compensation to the Southern Pacific Company might be required as a condition precedent to such continued enjoyment.

IX.

THE TESTIMONY SHOWS:

- (A) THAT THE POSTAL TELEGRAPH COMPANY HAS ACQUIRED A PRESCRIPTIVE RIGHT ON THE SOUTHERN PACIFIC RIGHT OF WAY.

It cannot be denied that appellee and its predecessor in interest have occupied the right of way of Southern Pacific Company continuously, openly, notoriously and adversely since the line was constructed in the place where it now stands in 1886. It is only necessary, therefore, to refer to the testimony of complainant's witnesses Anand, Durkee, Blake and Coyle, where the character of the user is fully set forth and the facts stated which show the acquiring by complainant of prescriptive rights. The only answer made to this claim of prescriptive rights is that the original entry was permissive. This contention, however, has heretofore been fully met and it seems unnecessary to unduly lengthen this brief with further argument on this point.

- (B) THAT ITS CONTINUED MAINTENANCE AND USER OF EXISTING EASEMENTS WILL CONSTITUTE NO INTERFERENCE WITH THE SOUTHERN PACIFIC COMPANY OR THE WESTERN UNION TELEGRAPH COMPANY.

Looking to the merits of this controversy, attention is again called to the fact that appellee is merely seeking protection in the rights which it has so long enjoyed. This protection, while of vital importance to appellee, in no way acts unfavorably upon the appellants. The claim was made in the answer of Southern Pacific Company that the use of all of its railroad right of way is required for railroad purposes, more especially because of the installation of an automatic system of block signals. This statement is not supported by the record. A wealth of testimony on this point was taken by complainant and a casual examination of the testimony of the witnesses Tuttle, Baker, Beaumont, McNicol, McReynolds, Smith and Stevenson (many of them entirely disinterested and some of them, if at all biased, inclined to approach this question from the attitude of the railroad man rather than the telegraph man) will show how preposterous is this claim. Attention has been called by appellants to the testimony of the witness McKeen. In a consideration of his testimony it should be borne in mind that this testimony was received in this case by agreement between the parties and was a transcript of the testimony given by this witness in the condemnation action tried in 1907, where an entirely different state of facts and a completely different condition was referred to than that which exists in the case at bar. The testimony of McKeen was received only "so far as the same

is applicable to the issues of this case.” (Transcript of Record, page 314.) Applying this test to this testimony, we find that it does not controvert the statements made by witnesses for the complainant, who refer directly to the physical conditions shown to exist in this cause.

Nor can there be any other interference of any kind with the physical properties of either of the defendants, or the performance by them of the public services in which they are engaged. The most complete and effectual answer which could be made to such a contention is the fact that the conditions which now exist, and for the continuance of which appellee is seeking protection, have existed for nearly thirty years. Appellants convict themselves of less than fairness when they seek to convince this court that there is interference with or injury to the conduct of their business by a continuance of physical conditions which they have permitted to exist without complaint for twenty-five years. And that there is and can be no such interference is demonstrated by the testimony of the witnesses Lynch, Parrett and Capen for the complainant. The existence of appellee's line is, in fact, of benefit to the defendant Southern Pacific Company, as appears from the testimony of its witness Sutherland, shown on page 313 of the Transcript of Record.

Attention is also called to complainant's Exhibit 19 shown at page 338 of the transcript,

wherein is set forth a synopsis of a large number of contracts entered into between telegraph companies and railroad companies providing for the maintenance of telegraph lines upon railroad rights of way. This exhibit and plaintiff's Exhibit X shown at page 365 of the transcript (and inserted as a contract fairly representative of the contracts abstracted in Exhibit 19), are conclusive on the point that the continuance of the existing easements of complainant will work no hardship upon or interference with either of the defendants.

(C) AN AGREEMENT BY SOUTHERN PACIFIC COMPANY TO TERMINATE THE LITIGATION AND A MALICIOUS INTERFERENCE ON THE PART OF WESTERN UNION TELEGRAPH COMPANY WITH THE EXECUTION OF THIS AGREEMENT.

It is a matter of regret to appellee that the lower court and this court have been burdened with a consideration of this cause. While appellee first invoked the aid of the courts, it feels in no way responsible for the fact that the necessity of determining this litigation has been thrust upon them. To all intents and purposes the litigation was terminated and the rights of all parties having any real interest in the controversy definitely settled by the agreement entered into between the complainant and the Southern Pa-

cific Company. While this litigation was pending the representatives of these two companies agreed upon an adjustment of their differences and incorporated this agreement into a written instrument of which the preliminary and final drafts appear in the record as complainant's Exhibits 21 and 22. The inquiry then becomes pertinent as to why this final draft was not executed and the court relieved from what should have been an unnecessary burden. And no answer can be found to this question save one. Western Union Telegraph Company, in no way itself affected by this agreement and with no right to participate in this settlement, except as such right might be claimed under the provisions of a contract, void as against public policy, for purposes of its own, stepped in and prevented this settlement. It was then required to assume, and is now bearing, the burden of the future conduct of this litigation. Representing, as it does, an extreme example of unjustified and unfair competition, showing, as it does, a desire and intention to injure and annoy the complainant, even though by so doing it in no way benefits itself, appellee marvels that it has the temerity to appear in a court of equity and ask for sanction of or support in so unjustifiable an undertaking.

X.

THIS COURT, HAVING ACQUIRED JURISDICTION, SHOULD ENTER A DECREE DETERMINING THE LITIGATION BY EITHER

- (A) AFFIRMING THE DECREE OF THE LOWER COURT, OR
- (B) ENJOINING INTERFERENCE WITH THE NECESSARY MAINTENANCE BY COMPLAINANT OF EASEMENTS ACQUIRED BY PRESCRIPTION AND USED IN THE PERFORMANCE OF A PUBLIC SERVICE.

Courts of equity came into being to correct abuses, the correction of which was not possible in the courts of common law. It is a maxim of equity that it looks to the substance and not to the form. These courts are now doing much to answer the criticisms made, with more or less justice, against our judicial system, complaining that our courts are courts of law and not of justice. But one coming before a court of equity must ask for justice however little he may desire it. Although appellee has read the brief of appellants and considered the points advanced by them, it does not learn because of what facts or circumstances natural justice and equity require anything other than a complete affirmance of the decree of the lower court. Appellants' argument were better directed to a court of law, whose hands are sometimes tied by the narrowness of

the limits within which it may move. It makes a poor appeal to the conscience of the chancellor.

In this case the record is complete, the equities are overwhelmingly in favor of appellee, the only interested defendant is quiescent, and the only active defendant is devoid of justification for its activity. Appellee feels it is weakening its case by attempting to argue it or do more than barely state it. There never was a case which called more loudly for the exercise of the plenary powers of a court of equity than does this case. Nothing has been suggested that requires action by this court other than an unqualified affirmance of the decree of the lower court. But should for any reason this court deem that decree improper in form, or in violation of technical rules through which it alone can be or has been attacked, nevertheless this court can and should finally determine this controversy and adjust the respective rights of the parties hereto by a decree of its own. The lower court by its decree, in effect, protected the complainant in the continued maintenance and user of those easements which it has for many years enjoyed and the future enjoyment of which is essential to the performance of its public duties. And this court can do no less than protect the complainant in the same way and to the same extent, either by affirming the existing decree or by entering a decree which shall enjoin all interference on the part of the defendants with the future use by

complainant of those rights to which it has so conclusively shown it is entitled.

Respectfully submitted,

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